87-1987 (1)

Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated,

Petitioners,

vs.

UNION OF SOVIET SOCIALIST REPUBLICS,

Respondent.

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Participation Certificates in the $50,000,000 6½% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated,

Petitioners,

vs.

UNION OF SOVIET SOCIALIST REPUBLICS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. A. Did the Second Circuit Court of Appeals exercise its judicial authority of statutory construction erroneously and excessively when it excluded retroactive application of the Foreign Sovereign Immunities Act of 1976, 28 USC Secs. 1330, 1602-1611, and amending Secs. 1391, 1441 (the "Act" or "FSIA") prior to the 1952 issuance of the Tate Letter altering State Department policy, and denied federal court jurisdiction over these suits?

   B. Did payments by the Foreign Claims Settlement Commission to claimants in 1959 of the proceeds of liquidation of the property assigned by the Litvinov Assignment, made on behalf of the Soviet Union on account of their repudiated prerevolutionary bonds, provide the basis for post-1952 subject matter jurisdiction, even were the Act so limited in its retroactive application?

2. A. Did any of the governments of Russia ever possess an expectation of immunity from suit after repudiation of the prerevolutionary bonds, which American tribunals could recognize as reasonably anticipated, justifiable, settled, or rising to the level of an antecedent right, either

   (a) prior to *de jure* recognition by the United States, despite their own conduct antithetical to international law, including confiscation of American property, and external repudiation of U.S. dollar debt having a situs in the United States;

   or

   (b) at any time thereafter, prior to payment or final settlement of such bonds, when the terms of *de jure* recognition of the Union of Soviet Socialist Republics (the "USSR") excepted sanction of such repudiation by the 1933 Litvinov accord which preserved claims and obligations on them pending final settlement?

   B. Should this determination here be made on an *ad hoc* basis on the acts of external repudiation and the facts of

recognition singular to this foreign state of the Soviet Union?

3. Does anything in the language or legislative history of the FSIA or in international law foreclose action on these pre-revolutionary obligations solely because of the passage of time?

4. Was the per curiam decision of the Circuit Court in conflict with *United States* v. *Pink*, 315 U.S. 203 (1942) by limiting the effect of the Litvinov Assignment as a waiver of immunity to actions on the property it assigned, when that compact also referred to obligations apart from assigned property, and separately agreed not to make any claims with respect to "acts done . . . by the Government of the United States . . . or its nationals, relating to . . . obligations of any Government of Russia", thereby waiving immunity, as well, in suits against the Soviet Union on such obligations, including the repudiated debt?

5. Should the support of the USSR by the Department of State in contesting the jurisdiction of American courts in these actions to resolve petitioners' claims on the repudiated bonds be found untenable as amounting to a plea which would perpetuate those sources of friction contrary to the ruling in *United States* v. *Pink*, *supra*, that the Litvinov Assignment, and proceedings under it, be interpreted consonantly with elimination of all such sources of friction, 315 U.S. at pp. 224, 225; be held to be improper because the Department of State owes support on behalf of the United States and petitioners to observance of the terms of the Litvinov Assignment as so defined by this Court, instead of joining the USSR in refusing to recognize them; and rejected for the further reason that opposition of the Department of State is inconsistent and irreconcilable with its own continuously maintained position that claims on the repudiated bonds are espousable by the United States for willful breach by the Soviet Union of international law?

PARTIES BELOW

Parties in the first action in the Court of Appeals were plaintiffs-appellants Carl Marks & Co. Inc., Hubert Park Beck, and Moses K.S. Altman, individually, and on behalf of all of other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated; and defendant-appellee Union of Soviet Socialist Republics.

Parties in the second and related action in the Court of Appeals were plaintiffs-appellants Carl Marks & Co. Inc., Hubert Park Beck, and Moses K.S. Altman, individually, and on behalf of all of other holders of Participation Certificates in the $50,000,000 6½% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated; and defendant-appellee Union of Soviet Socialist Republics.

The United States Department of Justice submitted a statement of interest for the United States in support of the Union of Soviet Socialist Republics.

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OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Second Circuit, reported at 841 F.2d 26, is printed as Appendix A. The Opinion of the United States District Court for the Southern District of New York (Brieant, Ch. J.), reported at 665 F.Supp. 323, is printed as Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered February 29, 1988. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

STATUTES AND INTERNATIONAL AGREEMENT INVOLVED

Foreign Sovereign Immunities Act of 1976, 28 USC Secs. 1330, 1602-1611, and amending Secs. 1391, 1441 (Appendix J).

Litvinov Assignment—Department of State, Eastern European Series, No. 1, 1933, pp. 13-15; reprinted in *United States* v. *Pink*, 315 U.S. 203, 211-213 (Appendix I).

STATEMENT OF THE CASE

On June 18, 1916, a group of American banks contracted to establish a Credit on behalf of the Imperial Russian Government of Fifty Million ($50,000,000) U.S. Dollars payable within three (3) years with interest at 6½% per annum, and thereafter created accounts in New York aggregating that sum in favor of the Imperial Russian Government, which withdrew the funds provided by its Credit and expended them. The banking group solicited the public in the United States to participate in the Credit, received subscriptions and payments for such participations, and on and after July 10, 1916, issued Certificates of Participation therein to the purchasers thereof.

On December 1, 1916, the Imperial Russian Government issued Five Year Five and One-Half Per Cent Bearer Bonds, due December 1, 1921, in the face amount of Twenty-Five Million ($25,000,000) U.S. Dollars, promised to pay them in gold coin of the United States of America or its equivalent in United States currency[1], in New York, or at a bank in Russia at the option of the bearer, and offered and sold the same to investors through banks in the United States.

The bonds and participation certificates were in the English language, and were traded on the old outdoor Curb Market, on the American Stock Exchange, and in the over-the-counter market in the United States.

The Imperial Russian Government was overthrown on March 16, 1917, and was succeeded by a provisional government which was a predecessor of the present Soviet Government, the Union of Soviet Socialist Republics. On January 21, 1918 (February 3, 1918 by the Gregorian calendar), the Soviet Government issued a decree with regard to "The Annulment of State Loans" which proclaimed, among other things, that:

---

1 Petitioners did not pursue claims on the gold equivalency clause. They acknowledged and the court found that the gold clause was unenforceable.

> "2. All foreign loans are annulled unconditionally and without exception."

The United States did not recognize Russia until 1933. This Court subsequently had occasion to note the recognition of the Union of Soviet Socialist Republics and review the Litvinov Assignment then made:

> "On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the de jure Government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims. The Litvinov Assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs." *United States* v. *Pink*, 315 U.S. 203, 211 (1942).

The government of the USSR termed the assignment portion of its agreement, "preparatory to a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals."

It also agreed separately from the assignment, in the same instrument and still pending such a settlement, "not to make any claims with respect to . . . acts done . . . by public officials in the United States, or its nationals, relating to . . . obligations of any Government of Russia . . ." *Litvinov Assignment*, Appendix I, pp. 74a, 75a.

The assigned assets were liquidated over a period of years. The proceeds realized were placed in a Soviet Fund against which the Foreign Claims Settlement Commission of the United States processed claims of nationals of the United States against the Soviet Government. In 1959, the Treasury of the United States disbursed the Soviet fund, paying part of it to holders of bonds and credit participations who had filed claims approved for awards. Recognizing that the Litvinov Assignment was only preparatory to a final settlement, each award by the Foreign Claims Settlement Commission bore the statement:

> "Payment of the award shall not be construed to have divested claimant herein, or the Government of the United States on his (her) behalf, of any rights against the government of the Soviet Union for the unpaid balance if any, of the claim."[2]

The United States Department of State has consistently treated the 1918 repudiation by the Soviet Union as a violation of international law giving rise to claims espousable by the United States in accordance with established principles of international law. However, it either has not espoused the bondholders' claims, or if it ever did, has failed to secure any agreement from the USSR to compensate them. The final settlement envisioned in 1933 when the Soviet Union was recognized has not yet been made.

Petitioners, class representatives of owners of the repudiated defaulted U.S. dollar-denominated debt obligations, commenced two actions on them under the Act on March 2, 1982 in the United States District Court for the Southern District of New York against the USSR, one on the bearer bonds, the other on the credit participation certificates. Except for differences in the terms of the debt instruments, sometimes collectively called "bonds", the cases are essentially the same.

After requirements for service of process prescribed by the Act were more than adequately fulfilled, the USSR defaulted, disclaiming any jurisdiction in American courts. Following an evidentiary hearing, findings of fact and conclusions of law were submitted and adopted in support of judgments by default, Appendices B and D, pp. 6a, 15a, pursuant to 28 U.S.C. Section 1608(e), and on March 31, 1986, orders and judgments were entered in favor of the class member plaintiffs against defendant Union of Soviet Socialist Republics, Appendices C and E, pp. 11a, 20a.

---

2 Appropriate credit was allowed to the USSR for payments by the Foreign Claims Settlement Commission on bonds held by class member claimants by reducing the amounts of the default judgments against the USSR.

On March 30, 1987, one day less than a year thereafter, the USSR, appearing without pleading, moved under Fed. R. Civ. P. 60(b)(1), (4) and (6) for relief from its defaults and dismissal of the complaints. The district court granted the motions under Rule 60(b)(4) and dismissed the complaints for want of subject matter jurisdiction on July 31, 1987.

Chief District Court Judge Brieant issued an extensive opinion, which included, among other *obiter dicta*, a preface consisting of an excerpt from fiction and a literary critique implying worthlessness of the Russian Imperial bonds, 665 F. Supp. 324, and n.1, p. 325, Appendix F, pp. 24a, 25a, and the citation of *Commonwealth Commercial State Bank* v. *Lucas*, 41 F. 2d 111 (D.C. Cir. 1930), a tax case concerning a 1921 valuation long predating USSR recognition, confirming a then nominal value for the bonds, 665 F. Supp. 328, Appendix F, p. 31a, each disparaging the legitimacy or collectibility of the bonds. These references were uncommon preliminaries for the *ratio decidendi* the eminent Chief Judge then went on to explore.

The district court ruled that Congress did not intend the Act to apply to pre-1952 claims, that such a retroactive application would adversely affect the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit on the repudiated bonds, that while the Litvinov Assignment could have been treated as bringing about an implied waiver of immunity which permitted related setoffs when actions were instituted on the property it assigned, it had no effect of waiver on suits on the repudiated debt. The court also ruled that the statute of limitations was a meritorious defense in these cases, applying a state statute even though an Act of Congress establishing international standards, and an international compact were implicated in these suits.

The plaintiff classes appealed the decision of the district court to the United States Circuit Court of Appeals for the Second Circuit. The Second Circuit, by a per curiam decision, affirmed substantially for the reasons set forth in Chief District

Court Judge Brieant's opinion. Petitioners now respectfully ask the privilege of review by this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

I

ISSUES CONCERNING RUSSIAN REPUDIATION OF EXTERNAL DEBT AND THE EFFECT OF USSR RECOGNITION AND THE LITVINOV ASSIGNMENT WERE DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH *UNITED STATES* V. *PINK*, 315 U.S. 203 (1942), AND OTHERS CONCERNING RETROACTIVE OPERATION OF THE FSIA, SETTLED EXPECTATIONS OF THE USSR, AND APPLICATION OF A TIME BAR TO INTERNATIONAL DEBT WERE WRONGLY DECIDED, LEAVING QUESTIONS WHICH REMAIN TO BE SETTLED AND WARRANT REVIEW BY THIS COURT

A. IMPORTANCE OF ISSUES IN THIS LITIGATION:

This controversy involves far more than monetary redress for the claims of some three hundred class claimants. Its determination bears as well on the interest of our nation in the reliability of international debt with a situs in the United States; the continuing validity of obligations of a foreign state whatever the passage of time; whether the executive which wanted a transfer of jurisdiction over sovereign immunity determinations to the judiciary, admitting it was ill-suited to make them, can be aided by court construction implying limitation on such jurisdiction in these cases, or in any case other than as specified by Congress, contrary to persuasive grounds for applying the Act as it was written; whether federal courts in the United States should hold the Soviet Union responsible for observance of the international agreement it made on *de jure* recognition, and adjudge the USSR answerable here for claims it agreed to preserve on its extraterritorially repudiated debt obligations; and on reaffirmation of the principles of *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1975) to sustain justiciability for petitioners' causes, especially pertinent if subject matter jurisdiction is

found to exist. This Court is respectfully asked to consider these and related issues first, for their relevance supporting reversal, and for commending the grant of this petition for certiorari.

(1) The United States has a national interest in the sanctity of international debt obligations with a situs in the United States.

The Second Circuit Court of Appeals affirmed this interest when Costa Rica tried to alter the terms of debt which was payable in New York, stating:

> "(t)he United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law," and that
>
> "(t)he Costa Rican government's unilateral attempt to repudiate private, commercial obligations is inconsistent with the orderly resolution of international debt problems. It is similarly contrary to the interests of the United States, a major source of private international credit." *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F. 2d 516, (2d Cir. 1985) p. 521, 522.

(2) In international law the full faith and credit obligations of a foreign sovereign or its responsible successors are not barred or inactivated through the passage of time.

No statute of limitations bars international debt. Prominent authority puts it that:

> "(t)here is no statute of limitations as to international claims," and
>
> "(g)overnments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well-founded, every principle of natural equity, of

> sound morals, requires it to be paid." 6 *Moore, International Law Digest*, Sec. 1052, p. 1003.

The reference from *Schmidt* v. *Polish People's Republic*, 742 F. 2d 67, 71 (2d Cir. 1984) in the per curiam decision of the Second Circuit that "nothing in its (the Act's) language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended", is erroneous and prejudicial in application to the claims against the USSR. In *Schmidt* there had been a *final* settlement with Poland, and a time bar based on state statute would have applied. The Court noted that the "Polish Claims Agreement" of 1960 was made in satisfaction of claims on nationalized property, 742 F. 2d at p. 69 and n. 2, and also wrote that

> "(t)he FCSC 1964-1980 payments were asserted by Poland in 1960 to be a final settlement of claims of American nationals." *Schmidt*, supra, p. 72.

Unlike the Polish Claims Agreement of 1960, the Litvinov Assignment never did settle the obligations of the USSR. To the contrary, it explicitly anticipated further settlement. Its undertakings were modified by the phrase "preparatory to a final settlement." For that reason, when the Foreign Claims Settlement Committee in 1959 paid over the avails of its liquidation of the Litvinov-assigned assets in limited partial payments to bondholders, it endorsed each award with a legend, cited *supra*, at p. 5, reserving all rights of the claimant to the balance. Furthermore, in *Schmidt* there was no international agreement on *de jure* recognition preserving rights on any repudiated obligations, as there was with the USSR. These distinctions set the cases on the Russian bonds completely apart from the Polish claims in *Schmidt*, and make the Court of Appeals observation inapposite. No time bar by a State of New York statute could be properly applied in these suits.

If the Soviet Union's disclaimer of liability were to be countenanced on any basis of passage of time, other foreign sovereign debtors following this concept and conduct could create chaos in international financial markets.

(3) The executive branch should not now be heard with favor in its plea to circumscribe the jurisdiction it wanted transferred to the courts, when liberal interpretation of the statute is persuasive, nor should the respondent's plea of lack of jurisdiction be entertained.

> "A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." *H.R. Rep. No. 1487, 94th Cong. 2d Sess.* p. 7, *U.S. Code & Admin. News (1976)* p. 6606.
>
> "Perhaps it also bears emphasis that a successful plea of sovereign immunity interposed by a State does not terminate the claim. Rather the claim is merely transferred to the diplomatic arena which is ill-suited for the settlement of private law or commercial disputes." Testimony, *Monroe D. Leigh, then Legal Adviser, Department of State, Hearings on H.R. 11315* (Subcommittee of House Committee on Judiciary—94th Congress, 2d Sess.—1976 Hearings).

Whatever present policy decisions impelled the Department of State to respond to any sensitivities of the USSR, or the courts below to accord a pseudo-righteous settled expectation of immunity to that sovereign despite its historical indifference to international law, should be disregarded and find no comfort in this Court.

Why should the United States Government which assured petitioners it had the right to espouse these repudiated debts under international law (see (6) *infra*) be a party to perpetuating

the repudiation, or to suppressing the resolution of petitioners' grievances on the repudiated bonds?

The Second Circuit Court of Appeals ruled when it found a broad basis of subject matter jurisdiction under the Act to include infractions under the Alien Tort Statute:

> "The other goals of the FSIA, to place immunity decisions firmly in the courts, and to codify procedures for suits against sovereigns, do not support an intent to provide immunity for violations of international law outside of the commercial context . . . The elimination of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law." *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421 at p. 427 (2d Cir. 1987).

The same Second Circuit need only have looked to the FSIA itself for the source of subject matter jurisdiction for these cases *within the commercial context*, that is, to 28 U.S.C. Sec. 1605(a)(3) which explicitly excepts foreign sovereign immunity

> "in *any* case—(emphasis added)
>
> > (3) in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,"

an exception claimed by petitioners, of which the district court was aware but on which it declined to rule, *infra*, pp. 25, 26.

There is an express and manifest intention in the Act to provide subject matter jurisdiction for violation of international law within the commercial context, clearly applicable to the facts in these actions. What Congress intended is discernible in the language it used.

To deny jurisdiction under these circumstances by implication that Congress intended otherwise, that is, that it meant the Tate letter to limit the Act, is an exercise of excessive and erroneous construction.

(4) The Litvinov Assignment and its undertakings as an international agreement to which the United States was a party should be observed in American courts.

The exceptions to immunity provided in the Act are stated to be:

> "(s)ubject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976]" 28 USC Sec. 1604.

See *United States* v. *Pink*, 315 U.S. 203 (1942), passim, regarding character of Litvinov Assignment as an international agreement.

(5) The Litvinov Assignment, by its language and under the rulings of this Court in *United States* v. *Pink*, *supra*, preserved claims against the USSR on the repudiated bonds until final settlement, and waived any defense of immunity in actions thereon.

The sources of friction between the United States and the Soviet Union as to commercial claims against the USSR when *de jure* recognition was under consideration, included intergovernmental debt (the Kerensky loan), these repudiated bonds, and confiscated property rights and interests of American nationals. This is documented in material, including memoranda from the Department of State to President Franklin D. Roosevelt, reprinted in *Foreign Relations of the United States, Dep't. of State Diplomatic Papers*, 1933, Vol. II, pp. 782-788, references to which are made hereinafter. Fifty-five years after the Litvinov Assignment and recognition, these claims have not yet been finally composed or settled. Only when and with whom it has suited the USSR to do so, has it made final settlements. It did so in July, 1986 with the Government of the United Kingdom, and in January, 1988 with Switzerland. Judicial confirmation of its debt to our nationals in American courts should not be suspended pending the pleasure of the Soviet Union.

Following the provisions of its assignment of property, which are stated in the first paragraph of the Litvinov Assignment, the USSR as has already been observed, went on to make further undertakings. These obviously fulfilled and must be read as intended to implement the suggestion to President Roosevelt that "(a)ppropriate action should be taken so that recognition would not have any retroactive effect which would be prejudicial to American interests." *Foreign Relations of the United States*, 1933, *supra* at p. 785. Subparagraph (a) of these further undertakings referred to judgments in American courts on the property the USSR was assigning. However, the USSR did then make a separate commitment, one affecting its *obligations*, unmistakably distinguishable from its *property*. As to these, including the repudiated debt on which the plaintiffs sued, the USSR pledged by subparagraph (b)

> "not to make any claims with respect to:
>
> "(b) acts done . . . by . . . the Government of the United States, or public officials in the United States, or its nationals, relating to . . . obligations of any Government of Russia . . ." *Litvinov Assignment*, Appendix I, pp. 74a, 75a.

Effectually this was a distinct pledge not to interfere with acts done in the United States relating to obligations of any Government of Russia pending their final settlement, and was a waiver, implied at the very least, of sovereign immunity as a defense.

The per curiam opinion of the Court of Appeals refers only to the provisions of the first paragraph of the Litvinov Assignment. 841 F. 2d at p. 27, Appendix A, pp. 4a, 5a. It is in error, as was the district court, in failing to read into its considerations the additional and just as important undertakings of the USSR, those preserving the Russian obligations on its repudiated debt and keeping the same intact until paid or finally settled.

In addition to the language of the pact, petitioners turn to landmark Supreme Court case law for guidance. *United States*

v. *Pink*, *supra*, undermines the argument that the Litvinov Assignment ever had viability as a meritorious defense in these actions.

In *Pink* the State of New York claimed the property of the New York branch of a Russian insurance company which had been nationalized. The United States claimed it under the Litvinov Agreement. New York law asserted Russia's extraterritorial expropriations and repudiation were invalid. *Pink* determined that New York policy and law must yield to superior federal considerations in favor of enforcement of the pact of Russia's recognition. It did not, however, condone repudiation, or rule that recognition exculpated the Soviet from the consequences of repudiation, nor did it overrule the New York principle. It merely suspended its operation in the interests of enforcing the international agreement.

> " '(C)omplete power of international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.' p. 331". *United States* v. *Pink*, citing *United States* v. *Belmont*, 301 U.S. 324, at 315 U.S. p. 223.

The Court's rulings were for the benefit of American nationals as well as for the Government of the United States:

> "The United States is seeking to protect not only claims which it holds but also claims of its nationals. H. Rep. No. 865, 76th Cong., 1st Sess . . . The existence of such claims and their non-payment had for years been one of the barriers to recognition of the Soviet regime by the Executive Department." idem., p. 227.

As to whether the Litvinov Assignment embraced the obligations on the repudiated bonds and claims on them, *Pink* ruled that the Litvinov Assignment was:

> "broad and inclusive. It should be interpreted consonantly with the purposes of the compact to eliminate all possible sources of friction between these two great nations." 315 U.S. 224, 225.

The District Court itself acknowledged that

> "(t)here is authority for the view that the instruments sued on here were among the 'claims' referred to in the Litvinov Assignment." 665 F. Supp. at p. 327, Appendix F, p. 29a.

The plaintiffs' institution of their actions therefore were "acts done" by American nationals to implement claims under the Litvinov Assignment. The entry of the prior default judgments against the USSR were "acts done" by a public official, the Chief Judge of the District Court, "in the United States."

By interfering with the course of this litigation in the United States, the USSR has breached its Litvinov undertaking to forbear from such interference, its agreement "not to make any claims . . . relating to . . . obligations of any Government of Russia."

The district court observed that as far as it could determine "the question of the effect of Soviet repudiation of foreign debts has never before arisen in a direct suit against the Soviet Union," 665 F. Supp. at p. 345, Appendix F, p. 62a, and that the "retroactive character of recognition" of the USSR "created an anomaly," 665 F. Supp. at pp. 343, 344, Appendix F, p. 60a, raising the question of whether or not recognition entailed nullification of the legal consequences of repudiation.

The flaw and error in this rationale is that the "anomaly" vanishes when the reservations in the Litvinov Assignment regarding Russian obligations are given adequate attribution. These barred the USSR from interfering with enforceability of the repudiated debt in American courts prior to their final settlement. Any contrary result would be in direct conflict with *Pink's* ruling that the Litvinov Assignment should be interpreted consonantly with its purpose to eliminate all sources of friction which existed between the United States and the USSR. The Circuit Court was in error in adopting the district court's limited view of the Litvinov Assignment, and in failing to give the compact the interpretation it required. In addition to assigning assets, rights on the debt obligations were preserved. As well as implying waiver by the Soviet Union in the setoff cases be-

cause the United States sued on the assets, there is no consistent reason for declining to imply waiver in the actions now brought by petitioners, whose claims too were covered by the Litvinov Assignment, on the debts in our domestic courts.

(6) The Act enables U.S. nationals to prosecute their own claims against the USSR when the Department of State has not espoused, or has been unable to espouse their claims since 1933, while consistently affirming their espousability.

> "(T)he United States cannot, under normal conditions, restrain a United States national who has been injured by conduct attributable to a foreign state, from seeking reparation from the appropriate agency of the foreign state before the United States espouses the claim. There appears to be no case where the government of the United States has questioned the right of the national to accept reparation directly from the foreign state." *Restatement (Second) of Foreign Relations Law of United States*, Ch. 7, Sec. 211(a), p. 625.

Does a national, now furnished by the Act with a domestic tribunal with subject matter jurisdiction, have lesser rights in the courts of his own nation? Should the Department of State which has failed him, whether by choice or by the exigencies of diplomacy, stand in his way inconsistently with its own position?

The position of the *Department of State* is evidenced by a letter, July 21, 1972, from Fabian A. Kwiatek, Assistant Legal Adviser, to the plaintiff Carl Marks & Co. Inc. outlining, *inter alia*, the history of the U.S.-dollar Russian bonds and their repudiation, and concluding:

> "In other words, international law distinguishes sharply between the legal consequences attaching to repudiation, the publicly declared refusal to pay, and mere default, usually an involuntary and not publicly declared failure to pay. Only repudiation or willful breach is regarded as violative of international law.

> "In view of the foregoing, it is the opinion of the Department that the repudiation by the Soviet Government of the dollar bonds floated by the Imperial Russian Government without permitting judicial action against it gives rise to an international claim which could be espousable by the United States in accordance with established principles of international law." Appendix K, pp. 90a, 91a.

This position has been documented in further correspondence, and the Department of State currently adheres to it.

(7) American Courts have a justiciable cause before them in these cases, and the principles of *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1975) should be reaffirmed by this Court.

Act of state doctrine considerations should not be permitted to have the effect of validating extraterritorial sovereign repudiation of private commercial obligations. This court has written it was persuaded:

> ". . . that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Alfred Dunhill of London, Inc.* v. *Cuba*, *supra*, p. 695.

See also, *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

B. RETROACTIVE APPLICATION OF THE ACT:

Petitioners' counsel is aware of the denials of certiorari in *Jackson* v. *People's Republic of China*, 794 F. 2d 1490 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1371 (1987), and *Slade* v. *United States of Mexico*, 617 F. Supp. 351, (D.C.D.C. 1985), *aff'd mem.*, 790 F. 2d 163 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 878 (1987), but addresses this Court with a fully researched conviction that insofar as the lower court decisions in those cases are based on grounds that Congress did not intend the Act to apply prior to 1952, they follow a flawed rationale and reach

a faulty conclusion. The retroactive applicability of the Act remains to be definitively and correctly established, and these cases offer a most appropriate occasion for this Court to do so. The arguments favoring retroactivity without a time limitation are persuasive.

Congress explicitly conferred upon the district courts "original jurisdiction . . . of any non-jury civil action . . . as to any claim" [28 USC Sec. 1330(a), Appendix J, p. 76a] concerning which a foreign state is not entitled to immunity under the standards and exceptions prescribed in its own statutory regime. The language of the Act referring to "any" action, is plain, and this Court said it was in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), 103 S. Ct. 1962, 76 L. Ed. 2d 81.

Jackson and *Slade* which construed a limit due to their reading of Congress' meaning, cited *Corporacion Venezolana de Fomento* v. *Vintero Sales*, 629 F. 2d 786 (2d Cir. 1980) without qualification as authority against retroactive application, when *Venezolana* categorically stated that the Act's preamble did not purport to say anything about the retroactive application of the Act's subject matter provisions, and was decided on the further grounds that the FSIA was not meant to confer subject matter jurisdiction on cases pending at the time the Act became law. *Venezolana*, 629 F. 2d at p. 790. *Jackson* also mistakenly relied on *Andrus* v. *Charlestone Products*, 436 U.S. 604, another case commenced prior to enactment of a statute. Chief Judge Brieant found plaintiffs-petitioners correct in contending that *Venezolana* referred only "to *cases* pending on the effective date of the FSIA, not to claims that accrued before that date," 665 F. Supp. at p. 347, Appendix F, p. 67a, but apparently didn't find the same prejudice in these misapplications which petitioners consider existed.

Turning to the Act's legislative history, nothing in it explicitly circumscribes the statute's application except as stated in the Act itself. While the Tate letter provided historic background and explained the differences between absolute and restrictive immunity, its use as a time-marker is inconsistent with the ra-

tionale in *Verlinden*, *supra*, which adopted Judge Weinfeld's comments in the district court:

> "Moreover, in the District Court's view, allowing all actions against foreign sovereigns, including those initiated by foreign plaintiffs, to be brought in federal court was necessary to effectuate 'the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertion of sovereign immunity.' ". 461 U.S. at p. 484.

Congress' intent was demonstrated by the broad language of the Act, and this Court sustained Congress' intent to keep the Act free of restrictions other than those in its own stated provisions and specified immunity exceptions when it declared:

> "Congress was aware of concern that 'our courts [might be] turned into small international courts of claims [,] '. . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.' Testimony of Bruno A. Ristau, Hearings on H.R. 11315, at 31. As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. Section 1605," 461 U.S. at p. 490.

Petitioners take the liberty of paraphrasing this language to refer to retroactivity in the context of a liberal application of the Act's subject matter jurisdiction provisions. The Act protected against the danger of improper retroactive litigation "not by restricting . . . potential" actions, but by enacting immunity and specifying the only exceptions to it, and in addition, of course, "requiring some form of substantial contact with the United States." These were the only protections written into the Act because Congress found no need for more. Legislative history divulges no uncertainty as to retroactive application requiring clarification by construction.

In further support of retroactive application, petitioners cited cases which applied the Act retrospectively, and to pre-1952 transactions. The District Court of the District of Columbia in an action involving the Swedish diplomat, Raoul Wallenberg, found subject matter jurisdiction under the Act over 1945 events in *Von Dardel* v. *USSR*, 623 F. Supp. 246 (D.C.D.C. 1985). The complaint alleged the arrest of the diplomat in Budapest, Hungary in 1945 and that since then he had suffered imprisonment or death. In *Asociacion de Reclamantes* v. *United Mexican States*, 561 F. Supp. 1190 (D.C.D.C. 1983), aff'd., 735 F. 2d, 1517 (D.C. Cir. 1984), the court inquired into whether an exception to foreign sovereign immunity existed in connection with ancient historical events involving a 1923 Treaty, a 1938 negotiation and a 1941 Final Settlement Treaty. Mexico received immunity, but not because of any finding that Congress did not intend the Act to apply to pre-Tate letter events. To the contrary, the FSIA was indeed analyzed and applied in the case to such events and transactions. Dismissal for lack of subject matter jurisdiction was affirmed because the facts alleged did not fall within either the "immovable property" or the "tortious act" exceptions to foreign immunity specified in the Act, those designated in 28 U.S.C. Sections 1605(a)(4) and (5). In *Reclamantes* the implication is clear that the Act would have been applied to claims long predating 1952 had the Court found exceptions to immunity under the Act. In *Schmidt* v. *Polish People's Republic*, 579 F. Supp. 23 (S.D.N.Y. 1984) the plaintiffs sued on 1939 defaults on Treasury Notes of the Republic of Poland issued on a renegotiation in 1937. The Court made a categorical finding of subject matter jurisdiction, 579 F. Supp. at pp. 27, 28. Petitioners urged this decision as a further example of application of the subject matter jurisdiction provisions of the FSIA to a pre-1952 cause even though the action was dismissed as time-barred under a state statute for reasons shown not applicable in these USSR cases.

Chief Judge Brieant denied the significance of these precedents. He ruled that *Von Dardel* doesn't involve retrospective application because the plaintiffs in it had "viable post-1952—indeed post 1977—claims" 665 F. Supp. at p. 349, Appendix F at p. 70a; that *Reclamantes* had no import as to pre-1952 appli-

cation because Mexico to date acknowledges its obligations, although it isn't paying them, 665 F. Supp. at p. 349, Appendix F at p. 70a; and as to *Schmidt*, where the cause arose in 1939, and where as heretofore shown, the action was time-barred under a state statute with some propriety because there had been a final settlement, that the case is not "really a clear example of the application of the FSIA to operative events before 1952" 665 F. Supp. at p. 348, Appendix F at p. 69a.

But if the Chief Judge's reasoning were to be followed with any consistency at all, and if subsequent events and transactions were the time measure of the FSIA's retroactive application, the petitioners' own causes of action on the Russian repudiated bonds would fall into the post-1952 category. Proceeds from the Litvinov Assignment were distributed as part payment of the repudiated bonds in 1959, the district court itself finding that "the Commission distributed the fund in or about 1959." 665 F. Supp. at p. 327, Appendix F, p. 30a. Applying the district court's own rationale to the plaintiffs' causes of action, the 1959 part payments by the Foreign Claims Settlement Commission would evidently involve post-1952 events, taking the cases out of the pre-Tate letter category.

The Circuit Court of Appeals ruled that

> "we need not decide the effect of the FSIA on causes of action arising between 1952 and the enactment of the Act." 841 F. 2d at p. 21, Appendix A, at p. 4a.

By concurring in Chief Judge Brieant's opinion, it compounds the same inconsistency. If the part payment made in 1959 takes these cases out of the pre-1952 class, the Court of Appeals would need to have resolved the post-1952 effect of the Act. If the part payment did not, then the *Von Dardel*, *Reclamantes* and *Schmidt* cases were sound, credible precedents for pre-1952 applicability.

No question has been raised as to the general retroactive application of the Act. The *Verlinden* case itself was one involving facts transpiring prior to the enactment of the Act, but authoritative guidance from this Court on the entire issue of retroactive operation of the Act would fill a troubling void.

C. SETTLED EXPECTATION OF THE USSR: NONE JUSTIFIABLE PRIOR TO RECOGNITION—NONE SINCE THE LITVINOV ASSIGNMENT

(1) Soviet immunity was not a justifiable expectation or an antecedent right to which the Soviet Union was entitled prior to 1926 or prior to its *de jure* recognition.

Chief Judge Brieant made two rulings with respect to settled expectations of foreign sovereigns of absolute immunity from suit in United States courts rising to the level of antecedent right, holding there was such a right prior to 1926, 665 Fed. Supp. at p. 338, Appendix F at pp. 50a, 51a, and separately deciding that the Soviet Union would have had a justified expectation, precluding constitutional retroactive application of the Act before the 1952 publication of the Tate letter, that it could not be sued in United States courts on the bonds involved in these cases. 665 F. Supp. at p. 347, Appendix F at p. 66a.

The Court of Appeals, citing *Jackson* and *Slade*, ruled that a pre-1952 "retroactive application of the FSIA would adversely affect the USSR's settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts," and stated, per curiam, that it believed "as did the district court, that 'only after 1952 was it reasonable for foreign sovereign to anticipate being sued in the United States courts on commercial transactions,' 665 F. Supp. at 339." 841 F. 2d at p. 27, Appendix A at p. 4a.

The fault and error in these rulings is their application to the Soviet Union. Implicit in applying the principles of international law is the premise that the foreign state favored by their application, itself abides by them. Far from adhering to international precepts, the Soviet Union ignored them. The doctrine of absolute sovereign immunity was developed in consideration of an "interchange of good offices" among nations. *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The record, however, reflects and documents that the Soviet Union, during pre-recognition, offended the dignity and integrity of the United States and its nationals, and was a delib-

erate transgressor of the international law and usages which *The Schooner*, and *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1926) have been cited to support.

The State Department Chief, Division of Eastern European Affairs, in one of the memoranda handed to President Roosevelt prior to the Litvinov accord referred to heretofore, made this statement for his Department:

> "The Soviet government has confiscated the property of foreign nationals in Russia and has repudiated the contractual obligations of Russia to foreign Governments and foreign nationals. It is to be noted that through these acts not only has damage been done to the interests of foreign States, but what is more important, the Soviet government has rejected international obligations which the experience of mankind has demonstrated are vital to the satisfactory development and maintenance of commerce and friendly intercourse between nations". *Foreign Relations of the United States, Department of State Diplomatic Papers*, 1933, Vol II, p. 784.

Listing losses suffered by the United States through Soviet repudiation and confiscation, the memorandum continues:

> "It is to the interest of the United States to obtain a settlement of the questions of repudiated bonds and confiscated property on the basis of accepted international practices not only on account of the material losses involved, but especially in view of the fact, as indicated above, that the settlement of these matters is of great importance for the establishment of a sound basis for trade between the United States and Russia. Moreover, it is to be noted that the Government of the United States has a profound interest in the maintenance of the sanctity of international obligations . . ." *idem.*, p. 785.

Throughout the pre-recognition years, the Soviet Union was denied access to our courts. Some of the reasons for that are cited in *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923), in which a unanimous

New York Court of Appeals explored the meaning and implications of comity upon which immunity depended:

> "Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive and judicial acts of other powers. We do justice that justice may be done in return." 235 N.Y. 255, at p. 258.

It ruled that comity

> "may, however, not be demanded as a right. It is yielded as a favor," *idem*, p. 259;

and with specific reference to the Soviet Union, concluded:

> "Does any rule of comity, then, require us to permit a suit by an unrecognized power? In view of the attitude of our government, should we permit an action to be brought by the Soviet government? To both queries we must give a negative answer." *idem*. p. 260.

The *Cibrario* court denied the Russian Soviet Republic any right to sue in our courts. Its rationale would likewise deny an affirmative defense of sovereign immunity if the same sovereign were a defendant in our courts *on any transaction with a situs in the United States*. The decision concludes with a statement clearly adverse to positing an "antecedent right" of immunity for this sovereign prior to 1933:

> "In the face of these declarations, it is impossible to hold that today any such relations exist between the United States and Russia as call upon our courts to enforce rules in favor of the latter depending on the comity of nations." *Cibrario*, p. 265.

In *Von Dardel* the court wrote:

> "The Foreign Sovereign Immunities Act, like every federal statute, should be interpreted in such a way as to be consistent with the law of nations. See, e.g. *Mac Leod* v. *United*

> *States*, 229 U.S. 416, 434, 33 S. Ct. 955, 961, 57 L.Ed. 1260 (1913). Congress explicitly anticipated such an interpretation, stating its intent that the Act '[incorporated] standards recognized under international law.' House Report supra, at 14, 1976 U.S. Code Cong. & Ad. News at 6613.
>
> "Historically, when a nation has committed a clear and egregious violation of a well-established and universally recognized standard of international law, courts have recognized the need for an appropriate exercise of jurisdiction . . .
>
> "Moreover, the doctrine of sovereign immunity has historically been based on principals of 'grace and comity': *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed. 2d 81 (1983). As such, the doctrine is inherently limited and appropriately disallowed where the foreign state defendant has acted in clear violation of international law." 623 F. Supp. at 253.

Petitioners' asserted a second exception to immunity under the FSIA, which the district court noted and about which it wrote:

> "Plaintiffs submit that at least two of the FSIA exceptions apply to this case:
>
> . . . second, the annulment of foreign loans was an expropriation illegal under international law, that is, a taking of the bondholders' property right to receive payments on their bonds, and so subject to the illegal takings exception under Section 1605(a)(3) (no immunity in cases 'in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state')." 665 F. Supp. at p. 335, Appendix at pp. 44a, 45a.

The district court, however, prejudicially omitted consideration of this claim, saying:

> "(t)his Court will not address plaintiffs' contention that the bond issue is subject to the Section (a)(3) exception, because we are persuaded by plaintiffs' contention that the flotation of the bonds was a commercial activity within the meaning of the FSIA" (*idem*),

and the Court of Appeals did nothing to ameliorate the damage.

Were appropriate findings made with respect to these claims, the Court would have had the basis for applying to the Act in these cases against the USSR, the tenet of statutory construction recently articulated and followed by the Second Circuit Court of Appeals that "(w)here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law. *Restatement of Foreign Relations Law of the United States* (Revised), Sec. 134 (Tent. Draft No. 6, 1985)" *Amerada Hess Shipping Corporation v. Argentine Republic*, *supra*, at p. 426.

(2) No Justifiable Expectation Since The Litvinov Assignment.

Following the Litvinov Assignment and absent a final settlement by the Soviet Union of its obligations, the USSR could not have had an expectation of immunity which could be termed justifiable precisely because of its undertakings in that pact preserving all rights on the obligations of any government of Russia, and its agreement to forbear from any interference with enforcement of those rights.

If the USSR chose to indefinitely delay payment or final settlement, does it follow with any logic or equitable rationale that during the course of its indifference and deliberate delay, our courts could be required to recognize any settled expectation on its part not to be sued on their bonds in United States Courts, any, that is, which was reasonable, justifiable, or that would rise to any level of right? Petitioners think not, especially in the light of the compact signed on recognition, and the history which preceded it.

Comments in *Schmidt* are also especially appropos on the subject of USSR's anticipation of suit:

"Poland, in essence, solicited and negotiated a loan in the United States and paid for that loan by issuing notes payable in U.S. dollars through a New York bank. By engaging in such a transaction, defendant availed itself of the privileges of American law, and litigation in this country should have been forseeable to it in the event that it failed to meet its obligations" 579 F. Supp. at p. 28.

II

THE ACTIONS ARE JUSTICIABLE

The actions, having subject matter jurisdiction, should not be denied their place in our courts through any non-jurisdictional doctrine. Petitioners refer to the commercial character of the loans, the situs of the debts, the acts of external repudiation in violation of international law, the recognition of the claims by the Department of State as espousable, the sophistication of the USSR in United States courts, unlike the People's Republic of China in the *Jackson* case, (see *Gregorian* v. *Izvestia*, 658 F. Supp. 1224 (C.D. Ca. 1987) pp. 1237-1239 for distinctions), and the fairness of these proceedings in which petitioners used the remedies provided by the Act. *Alfred Dunhill of London, Inc.* v. *Cuba*, *supra*, should be reaffirmed in application to these cases, as should the principles set out in *Allied Bank* v. *Banco Credito de Agricola*, *supra*.

CONCLUSION

The writ should be granted to provide a determination by this Court of important and unsettled questions of the subject matter jurisdiction of our federal courts under the Act, under international compacts such as and including the Litvinov Assignment, and under *United States* v. *Pink*.

Respectfully submitted,

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Counsel for Petitioners

Dated: May 19, 1988
New York, New York

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APPENDIX A

Per Curiam Opinion and Order of Second Circuit Court of Appeals Affirming District Court In Setting Aside Judgments and Dismissing Complaints

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 636, 637—August Term, 1987

(Argued January 29, 1988 Decided February 29, 1988)

Docket Nos. 87-7740, 87-7746

CARL MARKS & CO., INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated,

Plaintiffs-Appellants,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant-Appellee.

CARL MARKS & CO., INC., HUBERT PARK BECK, and MOSES K.S. ALTMAN, individually, and on behalf of all other holders of Participation Certificates in the $50,000,000, 6-1/2% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated,

Plaintiffs-Appellants,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant-Appellee.

Before:

OAKES, NEWMAN and MINER,

Circuit Judges.

Appeal from judgments entered in the United States District Court for the Southern District of New York (Brieant, C.J.), vacating default judgments previously entered against appellee and dismissing appellants' complaints for lack of jurisdiction.

Affirmed.

EDWARD M. SILLS, New York, NY (Lawrence Milberg, Milberg, Weiss, Bershad, Specthrie & Lerach, New York, NY, of counsel) *for Plaintiffs-Appellants.*

EUGENE THEROUX, Washington, DC (B. Thomas Peele, Baker & McKenzie, Washington, DC, of counsel) *for Defendant-Appellee.*

DOUGLAS LETTER, United States Department of Justice, Washington, DC (Richard K. Willard, Assistant United States Attorney General, Washington, DC; Abraham D.

Sofaer, Legal Advisor, Elizabeth G. Verville, Deputy Legal Advisor, United States Department of State, Washington, DC; Rudolph W. Giuliani, United States Attorney for the Southern District of New York, New York, NY, of counsel) argued and submitted a statement of interest for the United States.

PER CURIAM:

Plaintiffs-appellants are class representatives of holders of debt instruments, five-year external gold dollar bearer bonds and three-year credit participation certificates, that the Russian Imperial Government issued in 1916. Interest was paid on all the certificate installments and all but five bearer bond coupons after Lenin's Bolshevik Government repudiated "[a]ll foreign loans . . . unconditionally and without exception" in 1918. The instant actions were commenced under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1982), to recover the principal on both instruments and the interest represented by the five bond coupons from defendant-appellee Union of Soviet Socialist Republics ("USSR"). Default judgments were entered against appellee on March 31, 1986 in the United States District Court for the Southern District of New York (Brieant, C.J.). On March 30, 1987, appellee moved to vacate the default judgments pursuant to, *inter alia*, Fed. R. Civ. P. 60(b)(4) and to dismiss the complaints. The district court found the judgments void for want of jurisdiction, vacated them, and dismissed appellants' complaints. 665 F. Supp. 323 (S.D.N.Y. 1987). These appeals ensued.

We agree with the district court that although the issuance of public debt falls within the "commercial activity" exception of § 1605(a)(2) of the FSIA, *see* 665 F. Supp. at 335-36, the federal courts have no jurisdiction over these suits. The district court found that the Act is inapplicable to claims arising before the State Department issued the "Tate Letter" in 1952, adopting the "restrictive theory" of sovereign immunity that excluded nonpublic and commercial activities, *see id.* at 335. Such a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising "to the level of an antecedent right," of immunity from suit in American courts. *Id.* at 338-39; *see Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986), *cert. denied,* 107 S. Ct. 1371 (1987); *Slade v. United States of Mexico*, 617 F. Supp. 351, 358 (D.D.C. 1985), *aff'd mem.*, 790 F.2d 163 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 878 (1987); *see also Schmidt v. Polish People's Republic*, 742 F.2d 67, 71 (2d Cir. 1984) ("While the Act indisputably enhances a party's capacity to obtain personal jurisdiction over a foreign state . . . nothing in its language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended." (citation omitted)). We believe, as did the district court, that "[o]nly after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions," 665 F. Supp. at 339. However, we need not decide the effect of the FSIA on causes of action arising between 1952 and the enactment of the Act.

Further, we do not believe a contrary result is required by the Litvinov Assignment, under which the USSR assigned to the United States those claims " 'due it, as the successor of prior Governments of Russia . . . from

American nationals,' " *United States v. Pink*, 315 U.S. 203, 212 (1942). We agree with the district court that "in general the Soviet Union enjoyed sovereign immunity from suit on its repudiated debts, and that Litvinov Assignment cases presented a special exception, in that by suing, the sovereign (or its assignee) has waived immunity as to all claims arising out of the transaction sued upon," 665 F. Supp. at 342. Because the USSR obviously has not consented to suit in this action, by itself or through any assignee, the Litvinov Assignment does not provide a basis for exercising jurisdiction over the USSR.

In sum, we agree with the District Court that the FSIA does not apply to confer jurisdiction over the instant actions for substantially the reasons set forth in Chief Judge Brieant's comprehensive and well-reasoned opinion. Accordingly, the judgments of the district court are affirmed.

APPENDIX B

Findings of Fact and Conclusions of Law, and Order in Support of Judgment by Default, in Action on Bearer Bonds

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1245 (CLB) (Bearer Bonds)

Filed Feb 3 1986

CARL MARKS & CO., INC., et al.,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT BY DEFAULT PURSUANT TO 28 USC Sec. 1608(e)

PRELIMINARY STATEMENT

Proof has been filed in this action of due service of the Summons, Complaint, and Notice of Suit on the defendant Union of Soviet Socialist Republics in compliance with the provisions of the Foreign Sovereign Immunities Act, and that defendant has failed to plead or otherwise defend although the time to do so has expired, and an Order of the Court, dated May 3, 1983, has been filed herein decreeing that the Clerk of the Court shall enter a default against defendant Union of Soviet Socialist Republics, and in favor of the plaintiffs.

An Order of the Court, dated December 28, 1983, declared that this action was properly maintainable as a class action un-

der the provisions of Rule 23(b)(3) of the Federal Rules of Civil Procedure. Notice of Pendency of such class action was directed to be given pursuant to said Order to a class consisting of holders of five year five and one-half percent (5½%) gold dollar denominated Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, and was so duly given.

A further Order of the Court made September 20, 1985 fixed and determined the face amount of valid claims filed by members of the class at the sum of $11,274,000 with interest as may be found to be due. Claims approved were listed in Amended Schedules 1 and 2 attached to said Order. An inquest was held January 17, 1986.

The following are findings of fact and conclusions of law of the Court found satisfactory for the entry of judgment by default pursuant to 28 U.S.C. Sec. 1608(e) (Foreign Sovereign Immunities Act, Public Law 94-583, Oct. 21, 1976):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1.(a) The Court has jurisdiction over this action under the provisions of 28 U.S.C. Sec. 1330, and 28 U.S.C. Secs. 1602 et seq. (The Foreign Sovereign Immunities Act of 1976).

(b) This action is properly maintainable as a class action pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure. Notice was duly given pursuant to the Order, dated December 28, 1983, to a class consisting of holders of five year five and one-half percent (5½%) gold dollar denominated Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921.

The persons listed in Amended Schedules 1 and 2 attached to the Order dated September 20, 1985 are found to be members of said class to whom notice as aforesaid was directed to be given and who have not requested exclusion.

2. On December 1st, 1916, the Imperial Russian Government, then the duly constituted and de facto government of Russia, issued Five Year Five and One-Half Percent Bearer Bonds, due December 1, 1921, with interest payable June 1, 1917 and semi-annually thereafter, in the face amount of

Twenty-Five Million ($25,000,000.) U.S. Dollars, expressly promised to pay the sums due and payable thereon in the United States of America or Russia at the option of the bearer, and offered the same for sale and sold the same to investors through banks in the United States.

3. The issuance and sale of the Bearer Bonds was a commercial activity within the provisions of 28 U.S.C. Sec. 1603(d).

4. The Imperial Russian Government was overthrown on March 16, 1917, and was succeeded by a provisional government which was a predecessor of the Union of Soviet Socialist Republics (the Soviet Government).

5. On January 21, 1918, (Julian calendar, hereafter February 10, 1918, Gregorian calendar) the Soviet Government issued a decree with regard to "The Annulment of State Loans" which ruled among other items that:

* * * * *

> "2. All foreign loans are annulled unconditionally and without exception."

6. After said decree dated February 10, 1918, interest was paid on the aforesaid Bearer Bonds on June 1, 1918, December 1, 1918 and June 1, 1919.

7. The aforesaid Bearer Bonds are in default of all principal, and of interest from June 1, 1919 due on December 1, 1919, and thereafter.

8. On November 16, 1933 the Government of the United States extended formal diplomatic recognition to the Union of Soviet Socialist Republics as the state and government with authority and jurisdiction over Russia and the Soviet Union.

9. The Government of the United States simultaneously received and accepted an assignment (known as the Litvinov Assignment) of certain claims of the Union of Soviet Socialist Republics as successor to all predecessor Russian Governments to property in the United States.

10. The assets assigned under the Litvinov Assignment were liquidated over a period of years and the proceeds thereof appropriated by Congress into a Soviet Fund against which the Foreign Claims Settlement Commission of the United States was charged with accepting claims of nationals of the United States against the Soviet Government, and with certifying awards, and in or about 1959 the Treasury of the United States paid part of the Soviet Fund to those holders of Bearer Bonds who had filed claims which were certified for such awards.

11. The Order of this Court, dated September 20, 1985, has determined that interest on claims in the face amount of $6,136,000., should be reduced by the sum of $245,440., as a credit to defendant Union of Soviet Socialist Republics for the aforesaid payments out of the Soviet Fund to holders of the Bearer Bonds.

12. The aforesaid Bearer bonds are valid, binding and subsisting obligations of the Union of Soviet Socialist Republics as successor to the Imperial Russian Government, and the repudiation decree of February 10, 1918 has no extraterritorial effect.

13. There is due, owing and unpaid on each $1,000. Bearer Bond, interest from June 1, 1919 at 5½% per annum to December 1, 1921, the principal sum of each thereof, and annual interest thereafter at the legal rate of interest, with credit against such interest as allowed in the Order dated September 20, 1985.

14. The gold equivalency clause of the Bearer Bonds requiring payment in gold coin of the United States of America, or its equivalent in United States currency, is not enforceable.

15. Judgment by default should be granted in favor of the plaintiff class and against the defendant Union of Soviet Socialist Republics for the sum of Fifty Five Million Eight Hundred Seventy Thousand Eight Hundred Ninety Five ($55,870,895.) Dollars as at December 1, 1985. Submit a proposed Judgment.
SO ORDERED.

Dated: New York, New York
January 13th, 1986

Respectfully submitted,

/s/ EDWARD M. SILLS

Edward M. Sills
80 Pine Street
New York, N.Y. 10005
212-732-2000

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH

By: LAWRENCE MILBERG

A Member of the Firm
One Pennsylvania Plaza
New York, N.Y. 10119
212-594-5300

Attorneys for Plaintiffs

So found as above and ORDERED
White Plains, N.Y.
February 3, 1986

/s/ CHARLES L. BRIEANT
U.S.D.J.

APPENDIX C

Order and Default Judgment, Brieant, J., in Action on Bearer Bonds

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1245 (CLB) (Bearer Bonds)

Filed Mar 31 1986

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K. S. ALTMAN, individually, and on behalf of all other holders of Five Year Five and One-Half Per Cent External Gold (Dollar) Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921, similarly situated,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

ORDER AND JUDGMENT

The Court has held an inquest after default by defendant and has made Findings of Fact and Conclusions of Law dated February 3, 1986, and on the foregoing and all proceedings had herein,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The action is maintainable as a class action under the provisions of Rule 23(b)(3) F.R.Civ.P. on behalf of a class whose members consist of: All persons who are holders of five year five and one-half percent (5½%) gold dollar denominated

Bearer Bonds issued by the Imperial Russian Government, dated December 1, 1916, due December 1, 1921 ("the Class").

2. In accordance with 29 U.S.C. § 1608(e), Foreign Sovereign Immunities Act, Public Law 94-583, (October 21, 1976), the Court has jurisdiction over the subject matter of this action, personal jurisdiction over defendant and sufficient basis to enter judgment by default against defendant.

3. Notice of Pendency of Class Action has been given to the Class as directed by the Court pursuant to the provisions of Rule 23(c)(2) F.R.Civ.P.

4. The following persons, having duly requested exclusion pursuant to F.R.Civ.P. 23(c)(2), shall not participate in the proceeds of this judgment or take any benefit thereunder, but shall be free to proceed with respect to any individual claims, demands or causes in action as if this action had not been brought:

Aida E. Kline (Mrs. Carl Kline) ~~910~~ Surrey Road Bowling Green Media, Pa. 19063	Holder of Bearer Bonds in Face Amount of $60,000
Mr. Gerald B. Gould RR2 Box 33B Pound Ridge, N.Y. 10576 (Office Address—120 Broadway New York, N.Y. 10271-0273)	Holder of Bearer Bonds in Face Amount of $253,000

5. The Class shall recover against the defendant Union of Soviet Socialist Republics the sum of Fifty Five Million Eight Hundred Seventy Thousand Eight Hundred Ninety Five ($55,870,895) Dollars with interest thereon at 6% per annum from December 1, 1985.

The persons and entities whose claims are listed in Amended Schedules 1 and 2 attached to the Order Determining Claims filed herein September 23, 1985, are those

persons to whom the Notice of Pendency referred to in Paragraph 3 above has been given and who have not requested exclusion and the Court finds that they are members of the Class and each of them shall be entitled to a proportionate share of any sums paid, realized or collected on the judgment, or with respect to any amounts collected by them for which judgment has been entered on their behalf, to the extent the respective principal amounts of their approved claims bear to the aggregate principal amount of approved claims on said Schedules, except that the claims for interest of class members listed on Amended Schedule 2 shall be reduced proportionately by $245,440.

6. If any sums are offered by or on behalf of the judgment-debtor for payment on the judgment or on the Bearer Bonds for which it is made, or are paid, realized or collected on the judgment or on said Bearer Bonds by the Class representatives, by the Class or any of the Class members, or on its or their behalf by any person, firm, group, association or other entity, the acceptance of said offer shall be subject to approval by the Court, and said sums shall be held in escrow under the direction of the Court for the benefit of the Class and subject to a lien for attorneys fees and expenses in favor of plaintiffs' attorneys or their successors, and not distributed until the attorneys for the class representatives, or their successors, shall file an application and such application shall have been determined, for an allowance of reasonable legal fees and reimbursement of expenses incurred on behalf of the class to be awarded from the amounts paid, realized or collected, on such notice to the Class members as shall be directed by the Court.

7. Jurisdiction is reserved over all persons and matters relating to the collection of this judgment, redemption or payment of Bearer Bonds of the Class Members, liens for and award and payment of counsel fees and disbursements, and distribution of the net proceeds of this judgment.

8. The Clerk of this Court is directed to enter this Judgment.

Dated: White Plains, New York
March 31, 1986

So Ordered: 3-31-86

/s/ CHARLES BRIEANT
U.S.D.J.

APPENDIX D

Findings of Fact and Conclusions of Law, and Order in Support of Judgment by Default, in Related Action on Credit Participations

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1246 (CLB)
(Credit Participation Certificates)

Filed Feb 3 1986

CARL MARKS & CO., INC., et al.,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT BY DEFAULT PURSUANT TO 28 USC Sec. 1608(e)

PRELIMINARY STATEMENT

Proof has been filed in this action of due service of the Summons, Complaint, and Notice of Suit on the defendant Union of Soviet Socialist Republics in compliance with the provisions of the Foreign Sovereign Immunities Act, and that defendant has failed to plead or otherwise defend although the time to do so has expired, and an Order of the Court, dated May 3, 1983, has been filed herein decreeing that the Clerk of the Court shall enter a default against defendant Union of Soviet Socialist Republics, and in favor of the plaintiffs.

An Order of the Court, dated December 28, 1983, declared that this action was properly maintainable as a class action under the provisions of Rule 23(b)(3) of the Federal Rules of Civil Procedure. Notice of Pendency of such class action was directed to be given pursuant to said Order to a class consisting of owners of certificates evidencing participation in a fifty million dollar ($50,000,000.) six and one-half percent (6½%) three year credit in favor of the Imperial Russian Government pursuant to contract dated June 18, 1916, providing for payment June 18, 1919, and was so duly given.

A further Order of the Court made September 20, 1985 fixed and determined the face amount of valid claims filed by members of the class at the sum of $27,662,000., with interest as may be found to be due. Claims approved were listed in Amended Schedules 1 and 2 attached to said Order. An inquest was held January 17, 1986.

The following are findings of fact and conclusions of law of the Court found satisfactory for the entry of judgment by default pursuant to 28 U.S.C. Sec. 1608(e) (Foreign Sovereign Immunities Act, Public Law 94-583, Oct. 21, 1976):

Findings of Fact and Conclusions of Law

1.(a) The Court has jurisdiction over this action under the provisions of 28 U.S.C. Sec. 1330, and 28 U.S.C. Secs. 1602 et seq. (The Foreign Sovereign Immunities Act of 1976).

(b) This action is properly maintainable as a class action pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure. Notice was duly given pursuant to the Order, dated December 28, 1983, to a class consisting of owners of certificates evidencing participation in a fifty million dollar ($50,000,000.) six and one-half percent (6½%) three year credit in favor of the Imperial Russian Government pursuant to contract dated June 18, 1916, providing for payment June 18, 1919.

The persons listed in Amended Schedules 1 and 2 attached to the Order dated September 20, 1985 are found to be members of said class to whom notice as aforesaid was directed to be given and who have not requested exclusion.

2. On June 18, 1916 a syndicate of American banks executed a contract with the Minister of Finance of Russia to establish a Credit in New York on behalf of the Imperial Russian Government not to exceed Fifty Million ($50,000,000.) Dollars to be repaid within three (3) years with interest at the rate of 6½% per annum, and thereafter created accounts aggregating Fifty Million ($50,000,000.) Dollars pursuant thereto in favor of the Imperial Russian Government, which withdrew the funds provided by its Credit and expended them.

The banking group, consisting of J.P. Morgan & Co., The National City Bank of New York, Guaranty Trust Company of New York, Lee Higginson & Co., and Kidder, Peabody & Co., invited the public in the United States to participate in the Credit, received and accepted subscriptions and payment for such participations, and on July 10, 1916, and thereafter, issued Certificates of Participation therein to the purchasers thereof which entitled them to ratable distribution of all sums received on account of the principal of the Credit, and interest thereon.

3. The placement of the Credit, borrowing of U.S. dollars provided by the banking group in New York which the Imperial Russian Government withdrew and expended in the United States, and the sale and issuance of participations in said Credit, constituted commercial activity within the provisions of 28 U.S.C. Sec. 1603(d).

4. The Imperial Russian Government was overthrown on March 16, 1917, and was succeeded by a provisional government which was a predecessor of the Union of Soviet Socialist Republics (the Soviet Government).

5. On January 21, 1918, (Julian calendar, hereafter February 10, 1918, Gregorian calendar) the Soviet Government issued a decree with regard to "The Annulment of State Loans" which ruled among other items that:

* * * * *

> "2. All foreign loans are annulled unconditionally and without exception."

6. After said decree dated February 10, 1918, interest was paid on the aforesaid Credit Participation Certificates on July 10, 1918, January 10, 1919 and to June 18, 1919 when repayment of the Credit was due, was paid.

7. The aforesaid Credit Participation Certificates are in default of all principal, and of interest as the same may be found due after June 18, 1919.

8. On November 16, 1933 the Government of the United States extended formal diplomatic recognition to the Union of Soviet Socialist Republics as the state and government with authority and jurisdiction over Russia and the Soviet Union.

9. The Government of the United States simultaneously received and accepted an assignment (known as the Litvinov Assignment) of certain claims of the Union of Soviet Socialist Republics as successor to all predecessor Russian Governments to property in the United States.

10. The assets assigned under the Litvinov Assignment were liquidated over a period of years and the proceeds thereof appropriated by Congress into a Soviet Fund against which the Foreign Claims Settlement Commission of the United States was charged with accepting claims of nationals of the United States against the Soviet Government, and with certifying awards, and in or about 1959 the Treasury of the United States paid part of the Soviet Fund to those owners of Credit Participation Certificates who had filed claims which were certified for such awards.

11. The Order of this Court, dated September 20, 1985, has determined that interest on claims in the face amount of $11,616,500., should be reduced by the sum of $464,660., as a credit to defendant Union of Soviet Socialist Republics for the aforesaid payments out of the Soviet Fund to owners of the Credit Participation Certificates.

12. The aforesaid Credit Participation Certificates are valid, binding and subsisting obligations of the Union of Soviet Socialist Republics as successor to the Imperial Russian Govern-

ment, and the repudiation decree of February 10, 1918 has no extraterritorial effect.

13. There is due, owing and unpaid on each Credit Participation Certificates, the principal sum of each thereof, and annual interest thereon from the due date thereof, namely June 18, 1919, at the legal rate of interest, with credit against such interest as allowed in the Order dated September 20, 1985.

14. Judgment by default should be granted in favor of the plaintiff class and against the defendant Union of Soviet Socialist Republics for the sum of One Hundred Thirty Six Million Three Hundred Sixty One Thousand Nine Hundred ($136,361,900.) Dollars as at December 19, 1985. Submit a proposed Judgment. SO ORDERED.

Dated: New York, New York
January 13th, 1986

Respectfully submitted,

/s/ EDWARD M. SILLS
Edward M. Sills
80 Pine Street
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212-732-2000

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH

By: LAWRENCE MILBERG
A Member of the Firm
One Pennsylvania Plaza
New York, N.Y. 10119
212-594-5300

Attorneys for Plaintiffs

So found as above, and ORDERED
White Plains, N.Y.
February 3, 1986

/s/ CHARLES L. BRIEANT
U.S.D.J.

APPENDIX E

Order and Default Judgment, Brieant, J., in Related Action on Credit Participations

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1246 (CLB)
(Credit Participation Certificates)

Filed Mar 31 1986

CARL MARKS & CO. INC., HUBERT PARK BECK, and MOSES K. S. ALTMAN, individually, and on behalf of all other holders of Participation Certificates in the $50,000,000. 6½% Three Year Credit in favor of the Imperial Russian Government, dated as of July 10, 1916, due June 18, 1919, similarly situated,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

ORDER AND JUDGMENT

The Court has held an inquest after default by defendant and has made Findings of Fact and Conclusions of Law dated February 3, 1986, and on the foregoing and all proceedings had herein,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The action is maintainable as a class action under the provisions of Rule 23(b)(3) F.R.Civ.P. on behalf of a class whose members consist of: Owners of certificates evidencing participation ("Credit Participation Certificates") in a fifty million

dollar ($50,000,000) credit in favor of the Imperial Russian Government pursuant to contract dated June 18, 1916, providing for payment June 18, 1919 ("the Class").

2. In accordance with 29 U.S.C. § 1608(e), Foreign Sovereign Immunities Act, Public Law 94-583, (October 21, 1976), the Court has jurisdiction over the subject matter of this action, personal jurisdiction over defendant and sufficient basis to enter judgment by default against defendant.

3. Notice of Pendency of Class Action has been given to the Class as directed by the Court pursuant to the provisions of Rule 23(c)(2) F.R.Civ.P.

4. The following persons, having duly requested exclusion pursuant to F.R.Civ.P. 23(c)(2), shall not participate in the proceeds of this judgment or take any benefit thereunder, but shall be free to proceed with respect to any individual claims, demands or causes in action as if this action had not been brought:

Aida E. Kline (Mrs. Carl Kline) 910 Surrey Road Bowling Green Media, Pa. 19063	Holder of Credit Participations in Face Amount of $190,000
Mr. Gerald B. Gould RR2 Box 33B Pound Ridge, N.Y. 10576 (Office Address— 120 Broadway New York, N.Y. 10271-0273)	Holder of Credit Participations in Face Amount of $747,000
Estate of Amedee A. Schilly c/o (Ms.) Rosemary Coldwell 4321 South Compton Avenue St. Louis, Mo. 63111	Face Amount of Credit Participation Unknown

5. The Class shall recover against the defendant Union of Soviet Socialist Republics the sum of One Hundred Thirty-Six Million Three Hundred Sixty-One Thousand Nine Hundred ($136,361,900) Dollars with interest thereon at 6% per annum from December 19, 1985.

The persons and entities whose claims are listed in Amended Schedules 1 and 2 attached to the Order Determining Claims filed herein September 23, 1985, are those persons to whom the Notice of Pendency referred to in Paragraph 3 above has been given and who have not requested exclusion and the Court finds that they are members of the Class and each of them shall be entitled to a proportionate share of any sums paid, realized or collected on the judgment, or with respect to any amounts collected by them for which judgment has been entered on their behalf, to the extent the respective principal amounts of their approved claims bear to the aggregate principal amount of approved claims on said Schedules, except that the claims for interest of class members listed on Amended Schedule 2 shall be reduced proportionately by $464,660.

6. If any sums are offered by or on behalf of the judgment-debtor for payment on the judgment or on the Credit Participation Certificates for which it is made, or are paid, realized or collected on the judgment or on said Credit Participation Certificates by the Class representatives, by the Class or any of the Class members, or on its or their behalf by any persons, firm, group, association or other entity, the acceptance of said offer shall be subject to approval by the Court, and said sums shall be held in escrow under the direction of the Court for the benefit of the Class and subject to a lien for attorneys fees and expenses in favor of plaintiffs' attorneys or their successors, and not distributed until the attorneys for the class representatives, or their successors, shall file an application and such application shall have been determined, for an allowance of reasonable legal fees and reimbursement of expenses incurred on behalf of the class to be awarded from the amounts paid, realized or collected, on

such notice to the Class members as shall be directed by the Court.

7. Jurisdiction is reserved over all persons and matters relating to the collection of this judgment, redemption or payment of Credit Participation Certificates of the Class Members, liens for and award and payment of counsel fees and disbursements, and distribution of the net proceeds of this judgment.

8. The Clerk of this Court is directed to enter this Judgment.

Dated: White Plains, New York
March 31, 1986

So Ordered: 3-31-86

/s/ CHARLES L. BRIEANT
U.S.D.J.

APPENDIX F

Memorandum Decision (Opinion) and Order, Brieant, Ch. J., filed August 3, 1987, Setting Aside Judgments and Dismissing Complaints

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1245 (CLB)

CARL MARKS & CO., INC. et al.

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

82 Civ. 1246 (CLB)

CARL MARKS & CO., INC. et al.

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

MEMORANDUM AND ORDER

Brieant, Chief Judge:

—Yes well there was just one more thing here I, that I think you might . . .

—That? My God, haven't seen one in years.

—No this isn't what I . . . what is it.

—Russian Imperial Bond.

—You mean it isn't worth any, worth very . . .

—Mister Bast, anything is worth whatever some damn fool will pay for it, only reason somebody can make a market in Russian Imperials is because some damn, somebody like your associate will buy them. Happen to know how he, how this associate of yours got into all this?

—By, well, buying and selling at first I think and then he had some stock in a company and was going to bring some kind of legal suit for, for his class, I mean he . . .

—A class action?

William Gaddis, *JR* 201 (1975)[1]

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1 William Gaddis, author of the novels *Carpenter's Gothic* (1985), *JR* (1975), and *The Recognitions* (1955), is considered by many familiar with his work to be an American novelist in the tradition of Herman Melville. The quotation gives some flavor of Mr. Gaddis's remarkable technical achievement in *JR*, a novel of some 725 pages written almost entirely in dialogue. The plot of *JR* defies brief description, but revolves largely around the exploits of the eponymous JR, a sixth-grader from Long Island who, inspired by a field trip to the offices of the allusively named Typhon International Corp. in which his sixth-grade class purchases one share of Typhon stock as an exercise in corporate democracy, builds his own business empire. In the passage quoted, Edward Bast, a young composer who formerly taught music appreciation at JR's school and has become entangled despite himself in JR's business schemes, is reviewing JR's portfolio, which at this early point in the novel consists entirely of penny stocks and Imperial Russian bonds.

The play on words in Bast's reference to a "legal suit for his class" followed by Crawley's query about "a class action" should not go unremarked. Bast is referring to JR's sixth-grade class with its single share of Typhon stock, but he does not know that, in an exercise of corporate democracy, JR has used that share to bring a strike suit against Typhon—a class action in two senses.

Mr. Gaddis, who supported himself for many years through freelance writing for corporations, shows a remarkable knowledge of the law in *JR*, even to the point of allusions to then-current events. *See, e.g.*, *JR* at 702 (specific reference to effect of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), on class actions in comment by Typhon executive about "this Eisen ruling first decent decision the damn Court's handed down since FDR packed his [Supreme Court]").

In these two related cases, defendant Union of Soviet Socialist Republics ("USSR" or "Soviet Union") moves to vacate default judgments entered against it by this Court on March 31, 1986, and to dismiss plaintiff's Complaints.

The Russian Imperial Bonds

The named plaintiffs are class representatives of holders of debt instruments (collectively "the instruments" or "the bonds") issued by the Imperial Russian Government in 1916. Apart from the fact that different instruments are involved in each, these cases are essentially identical.

On December 1, 1916, the Imperial Russian Government issued $25 million in five-year external gold dollar bearer bonds at 5½% interest ("the bearer bonds"). The interest was payable semiannually, each June 1 and December 1 starting June 1, 1917, until the bonds themselves came due on December 1, 1921. These bearer bonds are the subject of No. 82 Civ. 1245.

The second issue, in the amount of $50 million, was assembled by a consortium of United States banks consisting of J. P. Morgan & Co., the National City Bank of New York, Guaranty Trust Company of New York, Lee, Higginson & Co., and Kidder, Peabody & Co., and offered to the public in the form of three-year credit participation certificates at 6½% interest ("the credit participation certificates" or "the certificates"). The contract establishing the credit was executed on June 18, 1916, and the certificates were issued on July 10, 1916. The certificates were due on June 18, 1919, with interest payable semiannually, beginning January 10, 1917, each January 10 and July 10. They are the subject of No. 82 Civ. 1246.

The Fall of the Russian Empire

The Imperial Russian Government did not long survive these debt issues. The first or so-called February Revolution began in Russia on February 24 (Old Style)/March 8 (New Style), 1917, at a time when that nation was locked in combat on the Eastern front of World War I. The success of the February Revolution was assured by March 12 when the police and military, who at first had fired on the crowds, joined forces with them. On

March 14 the ministers of a Provisional Government were named: the following day Czar Nicholas II, last of the Romanovs, abdicated, and the Imperial Russian Government ceased to exist. On March 17, 1917, the United States was the first nation to recognize the new Provisional Government. B. Lincoln, *Passage Through Armageddon* 357 (1986).

The fragile Provisional Government, led at first by Prince Georgi Lvov and later by Lvov's Minister of Justice, a lawyer named Alexander Kerensky, was unable to withstand the pressures of the continuing world war from without, and of revolutionary opposition, particularly that of the Bolsheviks, led by V. I. Ulyanov, known as Lenin, from within. Significant evidence suggests that the two types of opposition were related, in that the Germans financed the Bolsheviks, knowing that Lenin would promptly sue for peace and eliminate the need for Germany to maintain its Eastern Front. Lenin received safe conduct in April 1917 through the combat lines of the Central Powers, sent in a sealed boxcar, as if his ideas were contagious. *See, e.g.*, H. Shukman, *Lenin and the Russian Revolution* 168-70 (1966). Within six months the Bolsheviks had seized power in the October Revolution, October 24-26 (O.S.)/November 6-8 (N.S.). The fall of the Provisional or Kerensky Government was announced on November 7, and the last pockets of resistance at the Kremlin were wiped out on November 14. *See generally* B. Dmytryshyn, *A History of Russia* (1977); B. Lincoln, *supra*; B. Pares, *A History of Russia* (rev. ed. 1972). Peace with the Central Powers came with the signing of the Treaty of Brest-Litovsk on March 3, 1918.[2]

The Bolsheviks had promised to carry out the Provisional Government's plan to hold free elections for a Constituent Assembly, and did so on November 25/December 8, 1917. The Bolsheviks apparently did not interfere significantly with the

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2 The signing of the Treaty of Brest-Litovsk was so long delayed after the October Revolution because Leon Trotsky, the Bolsheviks' principal negotiator, was playing for time in the hope that Bolshevism would sweep Germany as it had swept Russia. In February 1918, however, Trotsky made the strategic error of unilaterally declaring peace, ending the state of truce without a treaty. The German Army promptly went on the march, causing the Bolsheviks to capitulate and sign.

election, and finished a respectable but distant second to the Socialist Revolutionary Party. Consequently, on January 19/February 1, 1918, after a stormy one-day session, Lenin dissolved the Constituent Assembly and took the power of Government in Russia to himself. On January 21/February 3, the Bolshevik Government issued a decree regarding the annulment of state loans, which proclaimed among other things that "All foreign loans are annulled unconditionally and without exception." Findings of Fact and Conclusions of Law in Support of Judgment by Default Pursuant to 28 U.S.C. § 1608(e) ¶ 5. Notwithstanding this decree, interest was paid on the remaining three installments of the certificates, on July 10, 1918, January 10, 1919, and July 10, 1920. Interest was also paid on the bearer bond coupons due on June 1, 1918, December 1, 1918 and June 1, 1918. Thus, what is at issue in this litigation is the Soviet Union's obligation to pay the principal on both instruments and the interest represented by the last five bearer bond coupons.

On July 10, 1918, the Bolshevik regime promulgated the first Soviet Constitution, under which the nation became the Russian Soviet Federated Socialist Republics (R.S.F.S.R.). After a period of intense social, cultural, and economic ferment, the R.S.F.S.R. was succeeded by the present Union of Soviet Socialist Republics upon the promulgation of the second Soviet Constitution on January 31, 1924.

Thus, the decree that gives rise to this case, in which Russia "annulled" all foreign debt obligations including payment on the bearer bonds and the credit participation certificates, was issued by the Bolshevik Government, which was the immediate successor of the Kerensky Government and immediate predecessor of the R.S.F.S.R.

The Litvinov Assignment and United States Recognition of the Soviet Union

When the decree was issued, the United States did not recognize the Bolshevik Government: it continued to recognize the Kerensky Government in exile until November 16, 1933, when it recognized the Government of the USSR. Simultaneously, an exchange of letters between President Franklin D. Roosevelt

and the People's Commissar for Foreign Affairs of the Soviet Union, Mr. Maxim Litvinov, established what has come to be known as the Litvinov Assignment. *See United States* v. *Pink*, 315 U.S. 203, 212-13 (1942) (reproducing texts of letters); *United States* v. *Belmont*, 301 U.S. 324 (1937) (holding the Litvinov Assignment lawful under President's power to recognize foreign governments). Under the Litvinov Assignment, "preparatory to a final settlement of the claims and counter claims between [the respective governments] and their nationals," *Pink*, 315 U.S. at 212, the Soviet Union assigned its claims, including those "due it, as the successor of prior Governments of Russia," *id.*, to the United States on condition that it be notified of any recovery by the United States on such claims.

The United States collected $9 million in pre-inflation money as a result of the Litvinov Agreement. *First National City Bank* v. *Gillilland*, 257 F.2d 223, 225 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958). In 1955, Congress enacted the Foreign Claims Settlement Act, ch. 645, 69 Stat. 562 (codified as amended at 22 U.S.C. §§ 1621-1641q (1986)). Under this Act, the proceeds of claims collected pursuant to the Litvinov Assignment were deposited into a Soviet Claims Fund. 22 U.S.C. § 1641a(a) (1982). Section 1641d empowered the Foreign Claims Settlement Commission to adjudicate the validity of, and disburse awards for, two kinds of claims. Section 1641d(a)(1) dealt with claims against Russian nationals by United States nationals who had secured prerecognition liens on Russian property located within American jurisdiction that later passed to the United States under the Litvinov Agreement. More importantly, § 1641(a)(2) empowered the Commission to determine the validity and amounts of "claims, arising prior to November 16, 1933, of nationals of the United States against the Soviet Government." Under § 1641*l*, an award by the Commission for less than the full amount of the claim does not extinguish any rights of the claimant against the Soviet Government.

There is authority for the view that the instruments sued on here were among the "claims" referred to in the Litvinov Assignment. Memorandum of Andrew T. McGuire, General Counsel, Foreign Claims Settlement Commission, May 17, 1956 ["McGuire Memo"], at 5 n.21 (citing Sack, *Diplomatic*

Claims Against the Soviets (1918-1938), N.Y.U. School of Law Contemporary Law Pamphlets, Ser. 1, No. 7, at 55 n. 27 (1938)). In any case it is clear that the Soviet Claims Fund was to be applied, pursuant to § 1641d(a)(2), among other things to the instruments to the extent owned by American citizens. Explicit historical references to the bonds exist. For example, in 1955 the Foreign Claims Settlement Commissioner noted that "The remainder of the fund would go to the payment of awards on some $75 million of repudiated Imperial Russian Government bonds, under a category involving about $350 million, more or less, for the nationalization or confiscation claims . . . ." *Hearings on H. R. 6382 Before the House Comm. on Foreign Affairs*, 84th Cong., 1st Sess. 37 (1955), *quoted in* McGuire Memo at 9. *See also Hearings Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 30 (1955) (colloquy concerning distribution of claims on Imperial bonds), *quoted in* McGuire Memo at 10. Pursuant to the Act, 22 U.S.C. § 1641*o*(a), the Commission distributed the Fund in or about 1959. Bondholders who had filed claims that were certified by the Commission received awards from the Fund. Findings of Fact ¶ 10. Plaintiffs allege that this distribution represents 4% of the value of the bonds.

Meanwhile, as indicated in our opening paragraph, a thriving market had developed for the bonds. A Protective Committee for the certificates was formed on June 17, 1919, and functioned through 1938. Foreign Claims Settlement Commission Panel Opinion 45, in Foreign Claims Settlement Commission, Tenth Semiannual Report to Congress, at 183. As late as 1950 the bearer bonds were listed in Moody's Manual of Investments. The bonds were traded on the New York Curb Exchange, later on the American Stock Exchange from 1921 through 1956, and thereafter over the counter.

Plaintiffs do not cite, and this Court has not discovered, any prior litigation of the validity or enforceability of any Soviet obligation to pay on these instruments. This Court has, however, discovered one case that specifically mentions the credit participation certificates, and another that probably involves the bonds.

Miller v. *National City Bank*, 147 F.2d 798 (2d Cir. 1945), was an action by holders of the credit participation certificates against National City Bank of New York and Guaranty Trust Company, two members of the syndicate that floated the credit, for alleged misappropriation of the balance of the credit that remained on deposit when the Bolsheviks repudiated the obligations. The merits of this claim were never reached: our Court of Appeals ruled only on the question whether plaintiffs could meet the jurisdictional amount for diversity cases by claiming the whole unexpended $5 million rather than their individual shares. Ultimately, the case was dismissed on the ground that the New York Supreme Court's determination that the statute of limitations had run was *res judicata*. 166 F.2d 723 (2d Cir. 1948).

Commonwealth Commercial State Bank v. *Lucas*, 41 F.2d 111 (D.C. Cir. 1930), was a tax case in which "[o]n July 10, 1916, appellant . . . purchased Imperial Russian 6½ per cent. bonds, at par value of $40,000. On May 31, 1917, it purchased Imperial Russian Government 5½ per cent. bonds at par value of $11,000." The percentages of interest, dates of purchase, and the fact that the par values are given in dollars make it probable that the bonds were those at issue here. In 1921, the bonds were selling at 10% of their par value. The Bank accordingly tried, on its 1921 tax return, to deduct the $51,000 the bonds cost as a bad debt. The Board of Tax Appeals disallowed the deduction, but the Court of Appeals for the District of Columbia permitted a deduction of 90%, that is, the amount the value of the bonds had declined from par. *Lucas* is thus tangentially relevant to the present case, indicating as it does a judicial recognition as early as 1930 (while the Soviet Government was still unrecognized) that Russian debt securities were in effect uncollectible.

History of This Litigation

Plaintiffs initiated these cases by filing a Complaint for each on March 2, 1982. These cases are governed by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1986), which, by specifying exceptions to sovereign

immunity, now provides the sole basis for federal court subject matter jurisdiction over suits against a foreign sovereign. 28 U.S.C. § 1604; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). The FSIA sets out elaborate procedures to ensure that the defendant sovereign receives notice of the suit against it. 28 U.S.C. § 1608. These were fully complied with by plaintiffs. As mentioned above, the Complaints in these cases were filed in this Court on March 2, 1982. In addition, the FSIA requires a plaintiff to file a "notice of suit," a document apprising the foreign sovereign of the pendency of the suit against it, in a form prescribed by the Secretary of State. 28 U.S.C. § 1608(a); 22 C.F.R. § 93.2(a) and Annex (1987). Notices of suit were filed in these cases on March 12, 1982. Section 1608 also specifies that service of a Summons and Complaint on a foreign state should be made in accordance with bilateral special service arrangements or applicable international conventions. If these are lacking, § 1608(a)(3) provides that service shall be made

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head to the ministry of foreign affairs of the foreign state concerned . . . .

Certificates of Mailing executed by the Clerk of this Court, establishing compliance with the § (a)(3) requirements, were filed on March 15, 1982.

This is evidently the mailing the Soviet Ministry of Foreign Affairs returned to the United States Embassy in Moscow under cover of Diplomatic Note No. 33/ossha, dated May 14, 1982. The Ministry refers to "the documents of the District Court of the Southern District of New York, received by mail," which it is returning "without execution." The Ministry stated the Soviet position that "in accordance with the principle of the sovereign equality of countries . . . the Soviet state . . . enjoy[s] immunity from jurisdiction of foreign courts [and] can not be brought to an American court as defendant without its evidently expressed consent for it." The Ministry reported that

the Soviet Union would not consent to suit, and added that it regarded the suit as a violation of the Litvinov Agreement, under which "the question about consideration of mutual financial claims in legal form has been closed once and for all." The Ministry also announced its expectation that the Executive Branch of the United States Government would intervene to assure Soviet immunity. It did not.

In the meantime, plaintiffs had moved to effect service under § 1608(a)(4), which provides that

> if service cannot be made within 30 days under paragraph (3), [it can be made] by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.[3]

Certificates of Mailing establishing the Clerk of the Court's compliance with § (a)(4) were filed on April 21, 1982.

These documents were received by the State Department Office of Consular Services on June 15, 1982. Unfortunately, as an August 9, 1982 letter from Elizabeth Swift, Chief of the Europe and Canada Division of the Office of Citizens Consular Services to plaintiffs' attorney explained, "[d]ue to a misunderstanding . . . service . . . under the procedures contemplated was not effected by the United States Embassy at Moscow." Counsel informed this Court of the situation by letter dated August 19, 1982, and that same day sent the Clerk of the Court a second set of papers for transmittal to the State Department.

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3 Plaintiffs' attorney seems not to have received a copy of the Soviet Diplomatic Note until June 1982. *See* Affirmation for Order Directing Entry of Default Against Defendant Under Rule 55(a), Federal Rules of Civil Procedure ¶ 7.

The Certificates of Mailing for these documents were filed on August 20, 1982. The documents were transmitted by the United States Embassy in Moscow to the Soviet Ministry of Foreign Affairs, under cover of Diplomatic Note No. 1710, dated October 20, 1982, a certified copy of which was docketed in this Court on February 17, 1983 after being filed some time during November 1982. Section 1608 (c)(1) specifies that "[s]ervice shall be deemed to have been made . . . in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note." Thus, service in these cases was complete on October 20, 1982.

The Ministry of Foreign Affairs responded to the transmittal by Diplomatic Note No. 93/ossha, dated November 2, 1982, returning the documents and reiterating the position it had expressed in Diplomatic Note No. 33/ossha, and insisting that "US authorities take immediate and effective measures to provide legal immunity of the USSR and to dismiss the present matter in the court," this notwithstanding that Diplomatic Note No. 1710 had explained that the Executive Branch was not in a position to comment on the suit and that claims of sovereign immunity in particular are to be adjudicated in the United States courts under United States law.

Astonished that a sophisticated major trading nation which enjoys full diplomatic relations with the United States would default the elaborate notice and service provisions of the FSIA, this Court before embarking upon the declaration of a class action and the conduct of an inquest for these ancient dishonored securities, determined to assure that defendant, and the United States also, would have more than the constructive notice which flows from statutory compliance. This Court, on its own initiative, insisted that plaintiffs take further affirmative steps to notify the Soviet Union and to inform appropriate United States officials of the status of the litigation.

On March 18, 1983, plaintiffs submitted a proposed order to this Court directing an entry of default against defendant. At that time this Court declined by an Endorsement Order to sign the proposed order pending further notice to interested parties, and directed that plaintiffs serve copies of the Endorsement Order, the proposed default order with affirmation and exhibits,

and the Complaint on the United States Attorney for the Southern District of New York by March 24, 1983, and to the Soviet Ambassador at the Soviet Embassy in Washington, D.C. On March 24, 1983, plaintiffs filed affidavits of service on the parties mentioned. These were measures not required by the FSIA; they were imposed by this Court on its own motion to ensure every reasonable effort to give the defendant notice of the actions against it, so that it could appear to assert any defense including that of sovereign immunity, before an entry of default, and also that the United States Department of Justice be given every reasonable opportunity, if so advised, to intervene on behalf of the United States in a matter of obvious importance to its international relations.

Defendants did not appear in response to this additional notice. By letter dated April 3, 1983, Soviet Consul V. Sinitsyn returned documents, as well as documents relating to *Frolova* v. *Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (per curiam), advising that "[a]ccording to the existing agreement of 1935 and legal practice these documents must be presented to the Soviet authorities via the Embassy of the United States in Moscow." This was done under cover of United States Diplomatic Note No. 1454, dated August 7, 1984. The concluding paragraph of that Diplomatic Note stated:

> United States law does not require transmittal by counsel for private parties, the Department of State, or the Embassy of the United States of interim documents, such as plaintiffs' requests for preliminary entry of default, to a foreign state defendant that has failed to respond to a complaint within a period specified by United States law. Nevertheless, Judge Brieant requested plaintiffs' attorney to do so with respect to the endorsement orders of March 18, 1983 and related documentation.

See also Letter from H. Edward Odom, Chief of European Services Division of the Office of Citizens Consular Services, to Edward M. Sills, Esq., August 31, 1984 ("[T]here is no provision in the [State] Department's regulations requiring it to transmit [interim] papers . . . and ordinarily the Department

does not do so. In view of their importance to these cases, Judge Brieant's specific request, and other factors, the Department has made an exception to this principle . . .''). No response was received from the United States Attorney for the Southern District of New York, or anybody else.

Faced with what appeared by then to be a deliberate default, this Court ordered the entry of a default against the Soviet Union on May 3, 1983. Copies of the proposed order had been served on the United States Attorney for the Southern District of New York and the Ambassador of the USSR through the Soviet Foreign Mission in New York City on April 22, 1983. Affidavit of Service of Lawrence Milberg, Esq., April 22, 1983.

This Court notes that it was not until May 23, 1983, about three weeks thereafter, that the Supreme Court decided *Verlinden*, *supra*, in which it held for the first time that "[u]nder the [FSIA], subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity . . . . Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *See also Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *Meadows* v. *Dominican Republic*, 628 F. Supp. 599, 603 (N.D. Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir. 1987); *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246, 251 (D.D.C. 1985).

The plaintiffs moved for class certification on June 29, 1983, which motion was granted on December 28, 1983. The Notice of Motion for class certification, along with its supporting documents, was also served on the United States Attorney and on the Soviet Ambassador, this time through the Soviet Embassy in Washington, on June 29, 1983.

The process of determining the claims of the class members was not completed until September 20, 1985, when this Court entered an Order Determining Claims. The Court held an inquest on January 3, 1986, and adopted plaintiffs' proposed Findings of Fact and Conclusions of Law on February 3, 1986.

On March 31, 1986, this Court finally entered a final judgment on default against the defendant USSR.

The Clerk of this Court, by letter dated May 1, 1986, sent a copy and translation of the default judgment to the Soviet Ministry of Foreign Affairs in Moscow, as required by 22 U.S.C. § 1608(e). This transaction is evidenced by Certificates of Mailing dated May 2, 1986. These documents were also rejected and returned. On July 11, 1986, the Clerk of the Court sent the documents to the Office of Citizens Consular Services for transmittal to the Soviets. The documents were sent to the United States Embassy and therewith transmitted under cover of Diplomatic Note No. 1772, dated August 27, 1986, which among other things noted that property of a defaulting defendant in the United States is subject to attachment by the plaintiff, and urged the Soviet Union to appear through United States counsel, if so advised, to seek relief from the default judgment. *See* Letter of Deborah A. McCarthy, Consular Affairs Officer, Europe and Canada Division, Office of Citizens Consular Services, to Edward Aponte, Chief Deputy Clerk, United States District Court for the Southern District of New York, September 8, 1986, and attachments. The Soviet Union's response, dated October 11, 1986, was not sent to this Court by the State Department until February 4, 1987. The Soviet Union again rejected services, reiterated its claim of absolute immunity, and stated that any attempt to enforce the default judgment, by attachment or otherwise, "would have most serious consequences for relations between our countries undermining the possibility of normal development of bilateral relations in different spheres."

In spite of the harsh rhetoric of its October 11, 1986 note, the Soviet Union thereafter retained counsel in the United States, and on March 30, 1987 filed a Notice of Motion to vacate the default judgment and dismiss the Complaint, with supporting documents.

On May 27, 1987, the United States for the first time submitted a Statement of Interest, as well as Declarations from Thomas W. Simons, Jr., Deputy Assistant Secretary of State for European and Canadian Affairs, and the Honorable Abraham D. Sofaer, a former Judge of this Court, now Legal Adviser to the Department of State. The Declarations both detailed how representatives of the United States had, after the

entry of the default judgment, endeavored to explain to the Soviet Union that the United States adhered to the restrictive theory of sovereign immunity, that under the FSIA determinations of immunity are made by the United States courts rather than by the Executive Branch, that the Soviet Union would consequently be well advised to appear in these cases, and that it could do so in order to contest the issue of its absolute sovereign immunity, without thereby waiving that immunity and submitting itself to the jurisdiction of the United States courts.

The Statement of Interest argues in detail that the default judgment should be held void for want of jurisdiction and the Complaints dismissed. All of the United States' submissions insist on the importance of this litigation to bilateral relations between the United States and the Soviet Union. However, as the procedural history just detailed makes clear, this Court went well out of its way to give notice of the progress of these lawsuits not only to the Soviet Union but also to the Executive Branch of our own Government, apprising both the State Department and the United States Attorney for the Southern District of New York of all developments, although it was not obliged to do so under the FSIA. This Court took these actions because of its own concern at the time to spare itself, the plaintiffs, the United States, and the Soviet Union the embarrassment and waste of effort that the entry of a default judgment, and the proceedings to determine its validity that would eventually but necessarily follow, might occasion. This Court is convinced that the USSR at all times knew that it was necessary to answer and appear in order to assert the waivable affirmative defense of sovereign immunity or plead the effect of the Litvinov Accord.

But for the fact that the USSR seems to present singularly compelling grounds for the relief requested, on the merits, we would leave the defendant to its laches, its neglect, and its studied and intentional default.

Plaintiffs filed their papers in opposition to the motion on May 29, 1987, oral argument was had on July 15, 1987, and decision reserved.

Rule 60(b)(1) and (b)(6) Considerations

The Soviet Union seeks relief from the default judgment under Rule 60(b) of the Federal Rules of Civil Procedure. In general, in deciding whether to grant a motion to vacate under Rule 60(b)(1) or (b)(6), courts consider whether the default was willful, whether defendant offers a meritorious defense, and how severely the nonmoving party would be prejudiced if the default judgment is vacated. *Davis* v. *Musler*, 713 F.2d 907, 915 (2d Cir. 1983).

Our Court of Appeals has noted that "prejudice" here does not mean mere delay: "Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.' " *Davis*, 713 F.2d at 916 (*quoting* 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* § 2699 at 536-37 (1983)). Here, no such effects can result from vacating the default judgment. Plaintiffs have already collected all the evidence they are going to, and the only issues raised by defendant's belated appearance are issues of law.

Moreover, under the circumstances of this case, the Soviet Union's willful default is tempered by its genuine but unfounded belief that it enjoys such sovereign immunity that it can merely crumple and discard our legal process, and that this inherent quality of sovereignty cannot be impaired unilaterally by the United States' adoption of the FSIA. *See Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1496-97 (11th Cir. 1984), *cert. denied*, 107 S. Ct. 1371 (1987).

We also believe that the Soviet Union has tendered meritorious defenses. To do so, a moving party "need not conclusively establish the validity of the defense(s) asserted," *Davis*, 713 F.2d at 916; "[i]t is sufficient to state defenses which, if established on trial, would defeat plaintiff's action," *Horn* v. *Intelectron Corp.*, 294 F. Supp. 1153, 1155-56 (S.D.N.Y. 1968) (Lasker, J.). *Cf. United States* v. *Moradi*, 673 F. 2d 725, 727 (4th Cir. 1982) ("[A]ll that is necessary to establish the existence of a 'meritorious defense' is a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party."). Here, the Soviet Union

has raised at least three defenses, any one of which would be complete: the statute of limitations; the effect of the Litvinov Assignment; and the inapplicability of the FSIA to pre-1952 claims. For these reasons, it would be appropriate to relieve the defendant from its default.

The FSIA and Rule 60(b)(4)

The Soviet Union also moves to vacate under Rule 60(b)(4). In FSIA cases, the differences between these motions offer the potential for confusion. Rule 60(b)(1) and (b)(6) motions require a court to examine the merits of a case—to find that there are meritorious defenses or other equitable reasons for vacating a default judgment. Rule 60(b)(4) motions, however, are jurisdictional: a successful (b)(4) motion establishes only that the default judgment was void for want of jurisdiction, and is not a judgment on the merits. *See generally Bell* v. *Hood*, 327 U.S. 687, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.")

In an FSIA case, the potential confusion results because a Rule 60(b)(4) dismissal can look like a dismissal for failure to state a claim upon which relief can be granted, and appear thereby to violate the rule of *Bell* v. *Hood*. The reason is that, as many courts have observed, the FSIA begins with a presumption of immunity that is only overturned if the plaintiff can demonstrate that the defendant sovereign's activity sued on falls under one of the exceptions to immunity enumerated at 28 U.S.C. §§ 1605 and 1607. Thus, as our Court of Appeals has observed, "In many cases a resolution of the substantive immunity law issues will be required in order to reach a decision on subject matter jurisdiction . . . . [A] court may have to interpret the substantive principles embodied in §§ 1605-1607 before deciding whether to take jurisdiction." *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 629 F.2d 786, 790-91 n.4 (2d Cir. 1980), *cert. denied sub nom. Corporacion Venezolana de Fomento* v. *Merban Corp.*, 449 U.S. 1080 (1981).

In the present case, this Court holds that plaintiffs have indeed stated a claim under the FSIA, inasmuch as the Imperial

Russian Government's offering of the bonds is a commercial activity in the sense of § 1605. The Court then goes on to hold, however, that because the FSIA does not apply retroactively to pre-1952 claims, sovereign immunity deprives this Court of jurisdiction over what we first determined to be a claim under the FSIA. The dismissal is, therefore, one for want of jurisdiction, not one on the merits, even though the Court must consider the merits before determining whether it has jurisdiction, in seeming violation of *Bell* v. *Hood*, *supra*.

The FSIA and the History of Sovereign Immunity

Section 1604 of the FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

As noted *supra*, in virtue of § 1604 the Act is the sole basis for federal court subject matter and personal jurisdiction over a foreign sovereign. "If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." *Verlinden*, 461 U.S. at 489 (footnote omitted) (observing in footnote that when federal court lacks subject matter jurisdiction over foreign sovereign it also lacks personal jurisdiction). *See also id.* at 493; *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985) ("[T]he comprehensive scheme established by the FSIA is the exclusive means by which foreign countries may be sued in American courts."); *Jackson* v. *People's Republic of China*, 596 F. Supp. 386, 387 (N.D. Ala.) (citing cases), *aff'd*, 794 F.2d 1490 (11th Cir. 1984), *cert. denied*, 107 S.Ct. 1371 (1987).

The evolution of foreign sovereign immunity in the United States courts presents an interesting story. For most of its history, as a matter of comity, the United States granted foreign sovereigns absolute immunity from suit in its courts. The classic expression of the doctrine of absolute immunity in our courts

was offered, in language resonant of Thomas Hobbes, by Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812):

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

This passage from *The Schooner Exchange* was quoted in *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U.S. 562, 572 (1926), as the Court's justification for extending immunity in an *in rem* action against a merchant ship owned and controlled by the Italian government. The Court reached this decision even though the State Department, in the court below, had said "It is the view of the Department that government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to . . . immunit[y]." *The Pesaro*, 277 F. 473, 479-80 n.3, *quoted in Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 38 (1945) (Frankfurter, J., concurring). Thus, it would appear that as of 1926 the Supreme Court relied on general principles of international law in immunity determinations: in *The Pesaro* it refused to recognize what we now call the "commercial activity" exception to sovereign immunity, even though the State

Department urged that position upon it. There was a difference of opinion in the Executive Branch on this issue as early as 1918, when in an exchange of letters the Attorney General claimed that foreign merchant vessels were entitled to immunity and the Secretary of State denied that view. *Restatement (Second) of Foreign Relations Law of the United States* § 69, at 211 (1965).

By the 1940s the Supreme Court had adopted a policy of deference to the Executive Branch on a case by case basis: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). *See Verlinden*, 461 U.S. at 486, *citing Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (stating principle of judicial deference to State Department determination of foreign sovereign's entitlement to immunity, in case in which State Department had certified such entitlement), and *Hoffman*, 324 U.S. at 33-36 (reaffirming principle of judicial deference but exercising *in rem* jurisdiction in absence of State Department certification of immunity or evidence that United States would customarily recognize immunity); *Restatement (Second) of Foreign Relations Law of the United States* § 69 at 212-13 (1965). Indeed, in *Hoffman* Justice Frankfurter's concurrence suggests that the Court effectively overruled *The Pesaro*. *Hoffman*, 324 U.S. at 38-42; *see Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 700 & 700-701 n. 14 (1976).[4]

In any case, after *The Pesaro*, "the executive department filed suggestions of immunity in conformity with that decision in cases involving merchant vessels owned and operated by foreign states." *Restatement (Second) of Foreign Relations Law of the United States* § 69 at 212-13 (1965).

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4 Writing for the majority a decade later in *National City Bank v. Republic of China*, 348 U.S. 356, 361 (1955), Justice Frankfurter retreated so far from *The Pesaro* as to say that "a major consideration for the rule enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations." Of course, that is not to say that this is the consideration that moved Chief Justice Marshall and his colleagues to enunciate the rule.

More generally, "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Verlinden*, 461 U.S. at 486.

In 1952, a sea change occurred when the State Department announced, in the so-called Tate Letter, its adoption of the "restrictive" theory of sovereign immunity. Letter of Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952, *reprinted in* 26 *Dep't of State Bull.* 984-85 (1952) and *Alfred Dunhill of London Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-15 (1976). Under the restrictive theory, immunity is extended only to a foreign sovereign's "public acts," (*jure imperii*), not its "private," including commercial, acts (*jure gestionis*). Legal Adviser Tate noted that "a shift in executive policy cannot control the courts," but believed that "the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so," noting that "at least some Justices of the Supreme Court" thought that Executive Branch determination of immunity should be dispositive. *Dunhill*, 425 U.S. at 714.

Congress enacted the FSIA in 1976, at the urging of the Department of State, because some thought the policy embodied in the Tate Letter had proved awkward to implement and required codification. *See Verlinden*, 461 U.S. at 487-88. As has been noted *supra*, the FSIA is now the exclusive basis for federal court jurisdiction over suits against a foreign sovereign, and a court lacks both subject matter and personal jurisdiction over the sovereign unless one of the exceptions set out in 28 U.S.C. §§ 1605-1607 applies. 22 U.S.C. § 1604.

Plaintiffs submit that at least two of the FSIA exceptions apply to this case: first, issuance of the bonds in the United States was a commercial activity, and so not entitled to immunity in virtue of § 1605(a)(2) (no immunity in cases "in which the action is based upon a commercial activity carried on in the United States by the foreign state"); second, the annulment of foreign loans was an expropriation illegal under international law, that is, a taking of the bondholders' property right to receive payments on their bonds, and so subject to the illegal takings exception under § 1605(a)(3) (no immunity in cases "in which rights in property taken in violation of international law

are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state").

This Court will not address plaintiffs' contention that the bond issue is subject to the § (a)(3) exception, because we are persuaded by plaintiffs' contention that the flotation of the bonds was a commercial activity within the meaning of the FSIA.[5] Plaintiffs cite unequivocal language in the legislative history to support that contention. The House Report characterized commercial acts generally as "those which private persons normally perform," or "of the same character as . . . might be made by a private person." H.R. No. 94-1487 at 14, *reprinted in* U.S. Code Cong. & Ad. News 6613, 6615 (1976). Issuance of debt instruments is certainly an activity in which private parties engage. Indeed, the House Report specifically singles out such activity: "Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions." *Id.* at 10. "This definition includes . . . an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States." *Id.* at 17. Thus, it seems clear, and the Soviet Union does not dispute, that a foreign bond issue subsequent to the effective date of the FSIA would fall within the commercial activity exception. *See Slade* v. *United States of Mexico*, 617 F. Supp. 351, 355 & n.12 (D.D.C. 1985), *aff'd mem.*, 790 F.2d 163 (1986), *cert. denied*, 107 S.Ct. 1360 (1987); *see also Schmidt* v. *Polish People's Republic*, 571 F. Supp. 23, 26 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984). The dispositive issue before this Court, therefore, is the same as that in *Slade* and *Jackson*: whether the FSIA applies retroactively so as

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5 The Court notes that this case is not affected by the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1986) (forbidding courts to invoke Act of State doctrine to decline to adjudicate, on the merits, claims arising out of expropriations in violation of international law after January 1, 1959), and therefore we need not consider the expropriation issue.

to confer jurisdiction over a foreign sovereign for its commercial activities engaged in long before the effective date of the FSIA and before the 1952 Tate Letter. If so, this Court had jurisdiction to enter a default judgment, which should now be vacated granting leave to the Soviet Union to answer or move with respect to the Complaint. If not, the Complaint must be dismissed for want of subject matter jurisdiction.

Retroactivity and the FSIA

In general, "[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908). Indeed, drawing on *Struthers Wells* among other sources, Justice Rehnquist recently wrote that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982).

Plaintiffs argue that this general principle is subject to an exception that applies to the FSIA: a statute may be applied retroactively if it is "remedial," that is, if its retroactive application would not interfere with "substantive" or "vested" rights. *See, e.g., Union Pacific Railroad Co.* v. *Laramie Stock Co.*, 231 U.S. 190, 199 (1913); *United States* v. *Kairys*, 782 F.2d 1374, 1381 (7th Cir.) ("In order for a statute to be considered remedial it must be one that neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights."), *cert. denied*, 106 S.Ct. 2258 (1986). Plaintiffs argue that the FSIA plainly states that it is applicable to all actions against a foreign state, without limitation as to time; that retrospective application would not deprive the Soviet Union of any antecedent rights, because absolute sovereign immunity before the Tate Letter had been a matter of comity rather than of right; that the FSIA is remedial, in that it creates no new rights but only provides a structure for enforcing independently or antecedently existing rights; and that a number of courts have in fact applied the FSIA in cases involving transac-

tions that occurred before its effective date. We take up each of these arguments in turn.

Construction of the FSIA

Our Court of Appeals has observed that the "[d]etermination of retroactivity [is] a matter of statutory construction." *Litton Systems* v. *American Telephone & Telegraph Co.*, 746 F.2d 168, 174 (2d Cir. 1984). This Court is unable so to read the FSIA's plain language and legislative history so as to give it retroactive effect. Congress provided a ninety-day grace period between the passage of the FSIA and its effective date, to put foreign sovereigns on notice of the codification of United States policy. *Jackson*, 596 F. Supp. at 388. "Such a postponement of a statute's effective date is evidence of the legislature's desire that it be given prospective application only." *Buccino* v. *Continental Assurance Co.*, 578 F. Supp. 1518, 1527 (S.D.N.Y. 1983); *see Ocean & Atmospheric Science* v. *Smyth Van Line, Inc.*, 446 F. Supp. 1158, 1159 (S.D.N.Y. 1978). Moreover, the jurisdictional section, 28 U.S.C. § 1330(a), provides that the district courts "*shall have*" jurisdiction over the cases specified in §§ 1605 and 1607 (emphasis supplied). The use of "shall have" indicates prospective application. *Martropico Compania Naviera S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977).

Thus, the plain language and legislative history of the statute provide thrusts against, rather than for, a congressional intent that the FSIA be applied retroactively. This conclusion accords with that reached by our Court of Appeals in *Schmidt* v. *Polish People's Republic*, 742 F.2d 67 (2d Cir. 1984). *Schmidt* involved notes on which Poland defaulted in 1939 because of the outbreak of World War II. The plaintiffs argued that the statute of limitations had not run because under New York law it is tolled when the defendant is absent from the jurisdiction, and Poland was not present in the jurisdiction—that is, amenable to process—until January 19, 1977, when the FSIA became effective. As Judge Winter observed, this "inventive argument," 742 F.2d at 70, "construes the FSIA as reviving all claims, how-

ever dormant, existing against foreign governments at any time before its passage." *Id.* at 71. That proved sufficient reason for the Court of Appeals to reject the argument:

> We believe this infuses the Act with consequences wholly uncontemplated by Congress. While the Act indisputably enhances a party's capacity to gain personal jurisdiction over a foreign state . . . nothing in its language or legislative history indicates that such wholesale reactivation of ancient claims was intended. . . . Moreover, since the "Tate Letter" . . . foreign sovereign immunity had not extended to the commercial activity of a foreign state . . . and Congress had no reason whatsoever to believe that it that it was reviving otherwise dormant claims based on such activity.

Id.

Was Absolute Immunity an Antecedent Right Eliminated by the FSIA?

Plaintiffs' second and third contentions go hand in hand. If the FSIA is merely remedial, it can be applied retroactively. To say that a statute is remedial is simply to say that it does not prejudice antecedent rights. Thus, if absolute sovereign immunity is not a matter of right, the FSIA is merely remedial and can be applied retroactively to sovereigns' commercial activities, because sovereigns had no antecedent right not to be sued for the consequences of such activities.

Plaintiffs rest their contention that absolute immunity is not an antecedent right on Chief Justice Burger's remark in *Verlinden* that "[a]s *The Schooner Exchange* made clear . . . sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." 461 U.S. at 486. Chief Justice Burger went on to observe that "[a]ccordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* Plaintiffs rely on this passage to support the view that absolute immunity was a matter of executive grace, such that the Execu-

tive Branch could acknowledge or withhold immunity on a case-by-case basis, in the tradition of the "Bernstein letter" approach to the analogous "Act of State" doctrine. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (Court of Appeals refused, for the first time, to apply Act of State doctrine, relying on a letter and press release from State Department Legal Adviser relieving American courts of such restraints on their jurisdiction in considering validity of Nazi official actions).

This Court's analysis of the history of foreign sovereign immunity shows that plaintiffs' picture is oversimplified. It was not always true that the Supreme Court deferred to executive branch determinations of immunity: as late as 1926, in *The Pesaro*, the Court found immunity, relying on the general and abstract principles laid down in *The Schooner Exchange*, in spite of the State Department's arguments to the contrary. It is fair to say that as late as 1926 the Supreme Court regarded sovereign immunity as a right grounded in the natural law of international relations. Only in the 1940s, in cases such as *Ex Parte Peru* and *Mexico* v. *Hoffman*, which the Chief Justice cites in *Verlinden*, did the Supreme Court adopt a policy of deference to the executive. It is ironic, moreover, that, as the drafters of the Restatement point out, the State Department began requesting immunity for foreign sovereigns as a matter of course only after and in response to *The Pesaro*. *Restatement (Second) of Foreign Relations Law of the United States* § 69, at 212-13. In light of *The Pesaro*, we may venture with some confidence to say that as late as 1926, almost a decade after the Soviet debt repudiation at issue in this case, the federal courts would not have taken jurisdiction over any instrumentality of a foreign sovereign—let alone the sovereign itself—no matter what the Executive Branch recommended.

Moreover, one should consider Chief Justice Burger's distinction between comity and constitutionality in the context of *Verlinden*, the question presented in that case was whether the FSIA permitted foreign plaintiffs to sue foreign sovereigns in courts in the United States, and if so whether this represented an unconstitutional expansion of the federal courts' Article III jurisdiction. The contrast between "matters of grace and com-

ity" and "restrictions imposed by the Constitution" is not, in this context, one between matters of international etiquette and constitutional right, but between matters of right grounded in comity and matters of right grounded in the Constitution. Chief Justice Burger is reminding us that although the federal courts would not have entertained an action against a foreign sovereign during the era of absolute immunity, they could have done so without violating the Constitution. They did not entertain such actions, as *The Schooner Exchange* made clear, because to do so would have violated general principles of international law which are *enforceable* only by appeal to grace and comity. That this is so makes the rights granted thereby to sovereign nations, no less genuine. The United States could at any time, and did in 1952, cease to grant absolute sovereign immunity without violating the Constitution, but only at the cost of ceasing to recognize a principle that it previously considered to express a right under international law, and which other sovereigns still hold valid.

This Court recognizes that other sovereigns still adhere to the doctrine of absolute sovereign immunity. Adherence to that theory, however principled, cannot be used as a basis for a United States Court to excuse a foreign sovereign from the obligation to appear after notice and assert its defenses, including that of immunity, under pain of suffering a default and the customary consequences thereof, including admission of the allegations of the Complaint. Some foreign sovereigns may be unfamiliar with the United States' adoption of the restrictive theory of sovereign immunity and its codification in the FSIA, and their failure to appear may be understood in this light, and to that extent mitigated. The Department of State shows here that it has undertaken the task of educating such sovereigns about the United States' legal system. The Soviet Union, however, is far from an unsophisticated litigant in the United States courts. It has frequently appeared in other cases to assert its immunity. *See Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246, 252 (D.D.C. 1985) (collecting cases).

Thus, this Court has no hesitation in holding that a foreign sovereign's pre-1926 settled expectation that it was absolutely immune from suit in the United States courts rises to the level of

an antecedent right. For until 1926 at least, the Supreme Court recognized absolute sovereign immunity on the basis of the abstract principles of international law stated in *The Schooner Exchange*. At some point after 1926, the courts deferred to the customary recommendation of immunity tendered by the State Department: this shift changed the basis, but not the fact, of the settled expectation of immunity. Only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions.

In short, this Court is persuaded by the reasoning of decisions such as *Jackson* and *Slade* that retroactive application of the FSIA to pre-1952 transactions and events would affect foreign sovereigns' antecedent rights adversely. This Court endorses the holding of the district court in *Jackson*:

> At the time of the issuance of the bonds in 1911 up until the date of their maturity in 1951, China relied on the well-founded expectation that the then extant, almost universal doctrine of absolute sovereign immunity governed all interactions between her and the United States and the citizens of the two respective countries. Concomitantly, China had no expectation of being hauled into a court in the United States to answer for any default of the bond issue. Similarly, the predecessors in interest of the plaintiff bondholders class had no expectation of any right to bring an action in a court of the United States upon a default of the bond issue.

596 F. Supp. at 389. The district court's similar observations in *Slade* are equally apposite:

> [T]o apply the FSIA to the underlying transactions would clearly prejudice the antecedent rights of Mexico. Between 1922 and 1951, the government of Mexico could safely assume that the then existing doctrine of absolute immunity governed any commercial transaction between it and the United States or its citizens. Mexico could therefore not reasonably anticipate being haled into court in the United States for defaulting on public debt instruments. Nor, for that matter, could holders of bonds and interest coupons

> reasonably expect to bring an action against Mexico in a United States court in the event of such a default. The Court finds that because Mexico may have reasonably relied on these factors in structuring its conduct prior to 1952, it would be inequitable to divest Mexico of the absolute immunity it enjoyed in 1922 by applying the FSIA to this case.

617 F. Supp. at 358 (footnotes omitted).[6]

This Court has undertaken its own study of cases between 1927 and 1952 involving the various Russian Governments and the Litvinov Assignment, in order to ascertain whether prior to 1952 foreign sovereigns indeed had the expectation of not being sued for their commercial activities in United States courts. Our inquiry lends support to the view that before 1952 the United States courts would have treated the Russian Governments as entitled to absolute sovereign immunity, except insofar as those Governments could have been considered to have waived their immunity or consented to setoffs by appearing as plaintiffs or the assignors of plaintiffs in the United States courts.

The Russian Governments in United States Courts, 1927-1952

Three lines of cases involving the various Russian Governments show that the Soviet Union had a justified expectation of

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6 One potential source of confusion should be dispelled here. The phrase "haled into court" risks confusion to the degree it can be taken to allude to *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."), a case that explored the doctrine of minimum contacts as a prerequisite for *personal* jurisdiction, not subject-matter jurisdiction. The Court makes this observation because the Soviet Union here twice cites *Woodson* when subject matter jurisdiction rather than personal jurisdiction is at issue. Memorandum of Union of Soviet Socialist Republics in Support of Its Motion for Relief from Judgment by Default and for Dismissal at 12 n.6 (citing *Woodson* in support of quotation from *Salde* given *supra*); Reply of Union of Soviet Socialist Republics to Opposition to Motion for Relief from Judgment by Default and for Dismissal at 9-10. The phrase can be used to refer to subject-matter jurisdiction, however, as in Justice Frankfurter's discussion of foreign sovereign immunity in *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) ("The freedom of a foreign sovereign from being haled into court as a defendant has impressive titledeeds.").

absolute sovereign immunity from suit in the United States courts arising from its repudiation of foreign debts. First, a number of cases brought by the Imperial and Provisional Governments involved the status of the Russian Governments as successors in interest to one another before and after the recognition of the Soviet Union. Second, the validity of the Litvinov Assignment was several times the subject of litigation. Third, after the Litvinov Assignment was upheld by the Supreme Court, the United States spent eighteen years, *see First National City Bank* v. *Gillilland*, 257 F.2d 223, 225 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958), litigating to collect the assets that had passed to it under the Assignment. Such litigation tended to fall into a pattern. The United States would typically sue to recover Russian deposits in American banks that had passed to the Soviets through their nationalization decrees.[7] The banks would then either dispute the validity of the nationalization decrees or of the Litvinov Assignment, or concede their validity but insist that the deposits be counted as setoffs against Russian debts owed to the same bank, thereby implicitly challenging the Soviet repudiation of foreign debts.

The Successor-in-Interest Cases

Although, as Justice Frankfurter remarked concurring in *Pink*, "[o]ne cannot read this body of judicial opinions . . . and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision," *Pink*, 315 U.S. at 203 (Frankfurter, J., concurring), the successor-in-interest cases do present a common theme. All held, following *The Sapphire*, 78 U.S. (11 Wall.) 164 (1871), that the possessor of rights and obligations in the international sphere is an abstract concept, the State, rather than the governments that purport from time to time to represent it. *See Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137 (1938) ("[T]he principle controlling here [is] that the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it" (citation omitted)); *Lehigh Valley Rail-*

7 The nationalization of the Russo-Asiatic Bank seems to have been responsible for most such litigation.

road Co. v. *State of Russia*, 21 F.2d 396, 400 (2d Cir.) ("The state is a community or assemblage of men, and the government the political agency through which it acts in international relations. . . . The foreign state is the true or real owner of its property, and the agency the representative of the national sovereignty.") (citations omitted), *cert. denied*, 275 U.S. 571 (1927); *id.* at 401 ("[T]he state is perpetual, and survives the form of its government."); *United States* v. *National City Bank*, 90 F. Supp. 448, 452 (S.D.N.Y. 1950) ("[T]he State of Russia was the obligor on the Notes before the revolution and . . . the State of Russia continued as the obligor after the revolution. The regime in power changed. The state, as a continuing personality, persisted.") The natural corollary of this view of the State as abstract entity is that the government that can sue and, if it waives immunity, be sued, on the rights and obligations of the State is the one recognized by the Executive Branch. *Guaranty Trust Co.* v. *United States*, 304 U.S. at 137 ("[S]uit in [the State's] behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state.")

Lehigh Valley, *supra*, decided in 1927, held that "Proof of the agency . . . is dependent entirely upon the political fact of the recognition by the political department of the government. . . . *If it be a fact that there is a Russian Socialist Federated Republic now in charge of the government of Russia, it would bring no different result here.*" 21 F.2d at 400 (emphasis supplied). This argument or contention is surely open to question. The Provisional Government ceased to function as a government as soon as it was overthrown. After his escape from Russia, Alexander Kerensky edited an emigre newspaper in Paris; he did not come to New York City until 1940, where he lived out his life, and he was not treated as a head of state before recognition of the Soviet Union in 1933. *See generally* R. Abraham, *Alexander Kerensky: The First Love of the Revolution* (1987). Neither did his Provisional Government function as a government in exile. Indeed, as far as this Court has discovered, the United States' continued recognition of the Provisional Government consisted primarily in its recognition of its

Ambassador, Mr. Boris Bakhemeteff, and of its Financial Attache, Mr. Serge Ughet. *See, e.g.*, *Lehigh Valley*, 21 F.2d at 400 (noting Bakhemeteff's and later Ughet's authority over property of Russian Government). Under these circumstances, one can sympathize with Justice Frankfurter's evident impatience with *Lehigh Valley*, which he characterized as reaching the "fantastic" conclusion that "the Kerensky regime was, in accordance with diplomatic determination, treated as the existing Russian government a decade after its extinction." *Pink*, 315 U.S. at 236 (Frankfurter, J., concurring).

In any case, under the abstract theory of the State, the United States courts unanimously held that between March 17, 1917 and November 16, 1933, the Provisional Government possessed standing, and the Soviet Government lacked standing, to appear in the United States courts. Conversely, they held that once the Soviet Government was recognized, the Provisional Government lost standing to appear in the United States courts. Thus, the Soviet Government was uniformly treated as the successor in interest to the Provisional Government, which in turn was the successor in interest to the Imperial Russian Government. Indeed, as the district court remarked in *United States* v. *National City Bank*, the Soviet Government understood itself as successor in interest to its predecessors:

> [A]ccepting the premise that retroactive effect must be given to recognition, it must be acknowledged that on November 7, 1917, the date of the revolution, Soviet Russia became the obligor on Russia's Treasury Notes. . . . That the Soviet Government so understood its obligations is implicit in the decree of repudiation made on January 21, 1918. There would have been no occasion for repudiation were there no obligation.

90 F. Supp. at 452. This contention is confirmed by the Litvinov Assignment itself, in which the Soviet Union assigned to the United States "the amounts admitted to be due or that may be found to be due *it, as the successor of prior Governments of Russia*." *Pink*, 315 U.S. at 212 (emphasis added).

The Litvinov Assignment, Nationalization, and Retroactive Recognition

As this Court observed *supra*, the Supreme Court recognized the validity of the Litvinov Assignment, as incidental to the President's power to recognize a foreign government, in *United States* v. *Belmont*, 301 U.S. 324 (1937), and again in *United States* v. *Pink*, 315 U.S. 203 (1942). These cases also settled important questions about the effect of recognition of the Soviet Union and about the extraterritorial effect of the various Soviet nationalization decrees. *Belmont* noted that the Assignment, the establishment of diplomatic relations, the recognition, and the exchange of ambassadors were all part of a single transaction: "The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence." That is, as the quote from *United States* v. *National City Bank supra* indicated, the United States' recognition of the Soviet Union was retroactive.

Pink built on *Belmont*'s holding of retroactivity in determining the effect of the Soviet Union's nationalization decrees. The *Pink* Court was able to refer to an authoritative tribunal, the People's Commissariat for Justice of the R.S.F.S.R., which had declared in November 1937 at the United States' request that "all nationalized funds and property of former private enterprises and companies . . . constitute the property of the State . . . irrespective of whether it was situated within the territorial limits of the R.S.F.S.R. or abroad." 315 U.S. at 219-20. The Court took this as a conclusive indication that the nationalization decrees were intended to have extraterritorial effect, and held that in virtue of the retroactive character of recognition it would recognize that effect. 315 U.S. at 234. Thus, under *Pink* title to Russian property in the United States vested in the United States, having passed to the Soviet Union by virtue of the nationalization decrees and thence to the United States by virtue of the Litvinov Assignment. *Id.*; *see Steingut* v. *Guaranty Trust Co.*, 58 F. Supp. 623, 632 (S.D.N.Y. 1944), *aff'd in part and modified in part*, 161 F.2d 571 (2d Cir.), *cert. dismissed sub nom. Guaranty Trust* v. *United States*, 332 U.S. 753 (1947). This set the stage for the eighteen years of litigation during

which the United States worked to collect on Litvinov Assignment claims.

If there had been no Litvinov Assignment the Soviet Union, following recognition, could have sued in the United States courts to collect its nationalized property in the United States. That is just what the United States did after it gained title to that property under the Assignment.

The Setoff Cases as Involving Soviet Waivers of Immunity

As observed *supra*, the typical fact pattern in a Litvinov Assignment case involved the United States suing a bank for a deposit whose title had passed to it from the Soviet Union as a result of the Litvinov Assignment; the bank would then claim a setoff against Russian debts, including notes, that it held. Cases that permitted such setoffs imply that in general the Soviet Union enjoyed sovereign immunity from suit on its repudiated debts, and that Litvinov Assignment cases presented a special exception, in that by suing, the sovereign (or its assignee) has waived immunity as to all claims arising out of the transaction sued upon. *Cf.* Fed. R. Civ. P. 13(a). As the court in *United States* v. *New York Trust Co.* put it,

> The set-off which may be asserted against a sovereign, is in reality a claimed recoupment and is "in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's (the sovereign's) action is grounded." . . . If [,however,] the claimed set-off to the suit by the sovereign is based "upon matter unrelated to the primary claim," it is "the equivalent of an independent suit against the sovereign, which, of course, may not be sued without its consent."

75 F. Supp. 583, 587 (S.D.N.Y. 1946). *United States* v. *New York Trust* did not present such a fact pattern. In that case, the Soviet funds the United States was suing to recover were held by the bank in the name of a railway company that the Soviets had nationalized; they were completely unrelated to the Provisional

Government treasury notes the bank held and tried to interpose by way of setoff.[8]

By contrast, a setoff was allowed in *State of Russia* v. *Bankers' Trust Co.*, 4 F. Supp. 417 (S.D.N.Y. 1933), *aff'd sub nom. United States* v. *National City Bank*, 83 F.2d 236 (2d Cir.), *cert. denied*, 299 U.S. 563 (1936), a pre-Litvinov Assignment case, even though the district court recognized that the special fund sued on by the Kerensky Government was distinct from that Government's indebtedness to the bank.

Ultimately, the view of the district court in *Bankers' Trust* prevailed, when in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), the Supreme Court rejected the "same subject" limitation. The courts have since followed *National City Bank* v. *Republic of China* in holding that the equities require allowing a defendant to assert any defensive counterclaim against a foreign sovereign plaintiff to the amount, only, of the claim sued on. *See, e.g.*, *Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 594 F. Supp. 1553, 1559 (S.D.N.Y. 1984) (discussing Justice Douglas's view that *National City Bank* v. *Republic of China* controlled in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 770 (1972) (Douglas, J., concurring)), *aff'd sub nom. Banco Nacional de Cuba* v. *Chemical Bank*, Nos. 86-7377, 86-7379, & 86-7387 (2d Cir. June 10, 1987) (available on LEXIS, Genfed library, UsApp file); *id.* 1566 n.10 (commending practical wisdom of Justice Douglas's position).[9] Furthermore, the *National City*

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8 As mentioned *infra*, *United States* v. *New York Trust* specifically held that the Soviet Union possessed sovereign immunity from suit on those notes.

9 In *First National City Bank* v. *Banco Nacional de Cuba*, the plurality declined to apply the Act of State doctrine to prohibit Citibank's assertion of a defensive counterclaim, in light of a State Department document it construed as having the effect of a Bernstein letter. Justice Douglas argued that reliance on this document was unnecessary in light of *National City Bank* v. *Republic of China*, which permitted assertion of such a counterclaim on a theory of waiver of sovereign immunity.

Justice Douglas's approach is even more appropriate in the present case. This case involves issues of sovereign immunity only and does not implicate the Act of State doctrine. Plaintiffs recognize this fact. Memorandum of

Bank v. *Republic of China* doctrine is now codified in the FSIA. 28 U.S.C. § 1607(c) (1986) (abrogating sovereign immunity for counterclaims "to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state"); *see Banco Nacional de Cuba* v. *Chemical Bank New York Trust Co.*, 594 F. Supp. at 1560 n.8.[10]

Plaintiffs in Opposition to Motion of Union of Soviet Socialist Republics for Relief from Judgment by Default, and for Dismissal 33. The Act of State doctrine is, of course, related to the doctrine of sovereign immunity, but differs significantly from that doctrine. Sovereign immunity is jurisdictional, and is now codified in the FSIA. The Act of State doctrine, by contrast, "is a judicially created exception to the rule that courts of the United States will decide cases before them where their jurisdictions has been properly invoked." *Banco Nacional de Cuba* v. *Chemical Bank New York Trust*, 594 F. Supp. at 1557.

Because this case rests on issues of sovereign immunity alone, the entire line of Act of State expropriation cases beginning with *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), continuing through *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) and *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), and including this Court's own *Chemical Bank New York Trust, supra*, and *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 505 F. Supp. 412, (S.D.N.Y. 1980), *aff'd*, 658 F.2d 875 (2d Cir. 1981), are inapposite, although of more than passing scholarly and historical interest.

10 It remains the case, however, that before *National City Bank* v. *Republic of China* the *Bankers' Trust* district court was the only court to permit a setoff on the basis of such equitable considerations. Indeed, the Second Circuit opinion in *National City Bank* v. *Republic of China* even declined, on grounds of judicial restraint, to apply the Tate Letter to permit defensive counterclaims while disapproving sovereign immunity in this context:

> Assuming, *arguendo*, that [the Tate] letter could and should affect judicial decisions, we see nothing in it to justify the suggested extension [to permit assertion of counterclaims based on sovereigns' commercial transactions]. We have no high regard for the idea that, without its consent, a government may not be sued for acts which, if done by a private person, would be actionable wrongs. But we feel that we must leave to Congress or the Supreme Court any marked diminution of that hoary doctrine (although, in the belief of many persons, it is basically immoral).

National City Bank v. *Republic of China*, 208 F.2d 627, 630 (2d Cir. 1953).

The now-settled character of the *National City Bank* v. *Republic of China* doctrine should not obscure the fact that the doctrine applies only to setoffs. Even cases that allow setoffs implicitly recognize that the underlying equitable principle is that of the sovereign's limited waiver of immunity, effectuated by its suing in the United States courts. The cases allowing setoffs do not justify abrogating immunity in a case such as the present one, wherein plaintiffs are trying to hale the sovereign into court as an original matter.

Soviet Repudiation of Foreign Debts

Soviet repudiation of predecessor governments' foreign debts would appear to be simply the obverse of Soviet nationalization of predecessor governments' property located abroad. The United States courts were generally not so quick, however, to give effect to the Soviet decree repudiating foreign debts.[11] The retroactive character of recognition, moreover, created an anomaly. If, as explained *supra*, recognition of the Soviet Union is retroactive to the October Revolution, once the Soviet Union was recognized would not the Provisional Government's actions be retroactively nullified? The courts concluded that

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11 When the McGuire Memo concludes that "recognition of the Soviet Government by the United States Government validated the acts of the Soviet Government with respect to its decree . . . concerning the annulment of State loans . . . which repudiated the obligations to the United States and its nationals incurred by its predecessor governments," McGuire Memo at 4, what is meant is that the repudiation is recognized as an act of the de jure government of the Russian State. The McGuire Memo did not mean to suggest that the repudiation should be recognized as releasing the Soviet Union from the obligations incurred by its predecessor governments. *See id.* (repudiation would justify espousal by United States or bondholder claims).

This Court observes that although the McGuire Memo concludes that the United States could justifiably espouse the claims of the bondholders against the Soviet Union, it does not support plaintiffs' contention that the Soviet Union could have been sued on the bonds in the United States courts. The specific question the McGuire Memo addressed was whether claims on the bonds were compensable by the Foreign Claims Settlement Commission. *See id.* at 1. FCSC funds, as has been said, were collected under the Litvinov Assignment: thus, the McGuire Memo's reasoning, however cogent, cannot support the conclusion that the Soviet Union did not enjoy sovereign immunity against suit on the bonds.

they were not. Indeed, two cases, *Guaranty Trust Co.* v. *United States* and *United States* v. *National City Bank*, can be read to imply that the Soviet repudiation was ineffective, precisely because recognition of the Soviet Union, though retroactive, did not entail nullification of the legal consequences of actions of the Provisional Government while it was recognized.

Belmont had held that "[t]he effect of [recognition] was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence." 301 U.S. at 330. "All acts," taken literally, includes the repudiation of foreign debts. Less than a year after *Belmont*, however, the Supreme Court retreated from this position, characterizing recognition instead as "an action which for *many* purposes validated here that government's previous acts *within its own territory*," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 140 (1938) (emphasis supplied).

The precise question that concerned the *Guaranty Trust Co.* v. *United States* Court was whether Guaranty Trust's notice to representatives of the Provisional Government of repudiation of liability on that Government's deposit at Guaranty Trust was binding, after recognition, as notice to the Soviet Government, so as to preclude tolling the statute of limitations. The consequence of holding that the notice was sufficient would be that the statute had run, and the United States, as assignee under the Litvinov Assignment, could not sue for the Provisional Government's credit.

In *Guaranty Trust Co.* v. *United States*, the Court rejected what it took to be the United States' contention that recognition "operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded." *Id.* The Government's position, in the Court's view, "is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government." *Id.* That is, recognition of the Soviet Government would nullify, retroactively, the legal consequences of Americans' transactions with the Provisional

Government. The result, in the Court's view, would be international chaos:

> The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our nationals in carrying them on.

304 U.S. at 140-41.[12]

In holding that the notice was binding, the Court did not go far beyond holding that acts of predecessor governments bind successor governments. *Guaranty Trust Co.* v. *United States* did not address the question of the effect of Soviet repudiation of predecessor debts. It held only that recognition of the Soviet Government did not, in and of itself, nullify the legal effects of acts of the Provisional Government while it was recognized.

As far as this Court has been able to determine, the question of the effect of Soviet repudiation of foreign debts has never before arisen in a direct suit against the Soviet Union. Indeed, it seems to have been discussed at length in only one of the cases in which banks tried to interpose Russian debts as setoffs or counterclaims to United States suits on Litvinov Assignment property. *United States* v. *National City Bank*, 90 F. Supp. 448 (S.D.N.Y. 1950), concluded on the basis of *Guaranty Trust Co.* v. *United States* that a setoff would be available. In this case, the United States sued the National City Bank of New York for the proceeds of an account originally belonging to the Russo-Asiatic Bank. The National City Bank was allowed to set off some $4 million in one-year 5% treasury notes issued in 1917 by

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12 The *Guaranty Trust* Court thus supported the conclusion Justice Frankfurter would later call "fantastic," that actions of the Provisional Government could bind the Soviet Union up to a decade after the Provisional Government had ceased to govern. In fact, the Court cited the district court decision in *Lehigh Valley* at this point.

the Provisional Russian Government and payable at the Bank. As in the other setoff cases discussed *supra*, this was the dispositive fact, for it made the notes "the equivalent of orders 'to the bank to pay the same for the account of the principal debtor thereon.' " 90 F. Supp. at 452, *quoting* former N.Y. Negotiable Instruments Law § 147.[13] The court held that repudiation did not prevent the Bank from executing such orders. "That order National City Bank could execute unless the act of repudiation prevented it. But if repudiation had such an effect, the set-off should have been disallowed in U. S. v. National City Bank [83 F.2d 236 (2d Cir. 1936), discussed *supra*]." 90 F. Supp. at 453 (footnote omitted).

The court then invoked *Guaranty Trust Co.* v. *United States*'s distinction between the territorial and extraterritorial effects of recognition. "The impact of repudiation by a sovereign within its own territory is governed by the law which prevails within that territory. But obligations created here and here performable are governed by local law." 90 F. Supp. at 453. It then drew what it took to be the consequences for Soviet immunity against setoff:

> Repudiation by a foreign sovereign of obligations subject to our domestic law is effective only to the extent that its sovereign immunity shields it from suit. Wherever the shield of sovereign immunity is not available there is nothing to prevent our domestic law from taking its course. Here, if the set-off is appropriate, immunity is not available. . . .
>
> Nor can the repudiation be regarded as a revocation of the bank's authority to pay the Notes for the account of the obligor. As already indicated, some time after the Soviet Government had repudiated the Treasury Notes, our Government cooperated in securing from the holders an extension of maturity, on request of the then recognized representatives of the Russian State. Relevant is the lan-

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13 As the subsequent discussion makes clear, the *United States* v. *National City Bank* court goes beyond earlier cases that suggested that a setoff was allowable only if it was related to the same transaction as the credit being sued upon.

guage of [*Guaranty Trust*, 304 U.S. at 140]: "The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." Were it held that the repudiation of 1918 must now be considered a part of our municipal law, or that the repudiation is operative as a revocation of the banker's authority, so as to convert these domestic obligations into scraps of paper for all purposes, then the words "conclusively" and "safely" would have to be stricken from the Court's opinion.

Does the allowance of this set-off conflict with the national policy as expressed in the Litvinov Assignment? I think it does not; or at least no more so than allowing the set-off in U.S. v. National City Bank, supra, or in giving effect to the Statute of Limitations in Guaranty Trust Co. v. U.S., supra. The United States took Russia's claims subject to their infirmities.

90 F. Supp. at 453.

Thus, *United States* v. *National City Bank* permits the inference that the Soviet repudiation of foreign debt would not have been recognized if the question had ever arisen directly. It is crucial to note, however, that it did not and probably could not arise directly. The *United States* v. *National City Bank* court was concerned only with letting the Bank set off Russian debits against United States credits. No matter what its views on the Soviet repudiation, the court allowed the setoff on a theory of waiver of sovereign immunity effected by the United States, as assignee of the Soviet Union, appearing as a plaintiff. Otherwise, the court would not have needed to invoke the theory that it was in effect dealing merely with "mutual debts capable of being set off by a bank." 90 F. Supp. at 453. Although the *United States* v. *National City Bank* court may well have believed that Soviet repudiation was ineffective, any such implication in the language of that case is, on its facts, dictum.[14]

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14 Not only was the *United States* v. *National City Bank* court's view about repudiation dictum, it was arrived by a process so tortuous that Judge Rifkind himself commented:

More importantly, even if such a suggestion were not dictum—if a United States court were to hold squarely that Soviet repudiation was ineffective—that would show only that the Soviet Union owed valid obligations on debts incurred by its predecessor governments. That does not mean that the obligations are enforceable in the United States courts—that is, that the Soviet Union would not have been immune from suit on those obligations. Creditors of the Soviet Union would have a right without a remedy; but this would put them in the same position any creditor was in, with respect to a sovereign, before the Tate Letter.

Again, the Court has discovered only one decision that framed this issue in this way. That decision, *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (S.D.N.Y. 1946), was discussed *supra* as a leading example of "same transaction" analysis in evaluating counterclaims against Litvinov Assignment suits. The court reached the conclusion that counterclaims were only entertainable against the United States if they arose from the same transaction as the assets sued upon by considering what the result of a suit against the Soviet Union, assuming there had been no Litvinov Assignment, would have been. The court concluded that there could not have been such a suit because the Soviet Union enjoyed absolute immunity, even when it was not recognized:

> Disregarding the Soviet Government's repudiation of the notes as obligations of a predecessor Russian Government, and the Soviet's annulment of such obligations by its de-

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> It is, of course, painfully clear that . . . I have traversed a bridge built of fictions. "Retroactivity" of Soviet recognition in 1933 commands us to treat the Russian decrees of 1917 *as if* the United States had recognized the Soviet Government on the day of the revolution. That fiction prevails until it collides with another, that the accredited agents of the Provisional Government must, at least in some respects, be treated *as if* there were a government whom they represented. Despite the cataclysmic character of the Bolskevik revolution, we must treat the Soviet Government as the uninterrupted extension of the empire of the Czars.

90 F. Supp. at 454.

> cree of January 21, 1918, and assuming that the New York Trust Company had a valid legal claim against the Soviet Government based on these notes, nevertheless the Soviet's [*sic*] sovereign immunity would be a shield against the enforcement of the Trust Company's claim. Sovereign immunity is based on international law and it may be asserted even by an unrecognized government.

75 F. Supp. at 587. *See Restatement (Second) of Foreign Relations Law of the United States* § 107, comment d ("A claim of immunity as a foreign state may not be defeated by asserting that an entity that qualifies for recognition as a state . . . is not recognized as such . . . ."). *United States* v. *New York Trust Co.*, then, clearly indicates that as late as 1946 the United States courts regarded the Soviet Union as entitled to absolute immunity from claims arising from its repudiation of foreign debts. Thus, *Guaranty Trust Co.* v. *United States* and *United States* v. *National City Bank*, contrary to first appearance, lend no support to plaintiffs' position. What matters is not whether the United States courts would have given effect to the Soviet repudiation—as *United States* v. *National City Bank*, at least, implies it would—but whether the Soviet Union was regarded as immune from suit on the bonds no matter what the effect of the repudiation.

History provides us, then, with every indication that the Soviet Union would have had a justified expectation, before the publication of the Tate Letter, that it could not be sued in the United States courts on the bonds involved in this case. This Court concludes that that expectation rises to the level of an antecedent right that precludes constitutional retroactive application of the FSIA in this case.

Prior Cases on Pre-1952 Application of the FSIA

This Court must still address plaintiffs' contention that the FSIA must be applicable to pre-1952 commercial transactions, because other courts have so applied it. The short answer is that this contention is contrary to a binding decision of our Court of Appeals. In *Venezolana*, 629 F.2d at 790-91, our Court of Appeals held that the court below did not have FSIA jurisdiction

over a case filed on April 9, 1976, almost a year before the FSIA took effect: "we cannot agree with the district court's view that Congress intended such retroactivity [over cases pending on the effective date of the FSIA] in the case of the FSIA." *Id.* at 791. This Court finds that plaintiff is correct in contending, however, that *Venezolana* refers only to *cases* pending on the effective date of the FSIA, not to claims that accrued before that date. The Court has therefore reviewed all the cases that the parties have brought to its attention involving alleged retroactive application of the FSIA.

Two degrees of retroactivity are at issue here. The Soviet Union is willing to concede that the FSIA can apply to claims arising before its effective date, so long as those claims did not arise before the publication of the Tate Latter in 1952. On this view, it was the Tate Letter's adoption of the restrictive theory of sovereign immunity that *created* a cause of action that had never existed theretofore, against foreign sovereigns for their commercial acts. Plaintiffs maintain, to the contrary, that the plain language of the FSIA sets no limits on its applicability, so that it can apply retroactively to pre-1952 claims.

It is settled that a cause of action against foreign sovereigns for their commercial acts existed before the FSIA. As mentioned *supra*, it was on this basis that Judge Winter rejected the argument that passage of the FSIA tolled the statute of limitations for actions against foreign sovereigns. *Schmidt* v. *Polish People's Republic*, 742 F.2d 67, 71 (2d Cir. 1984) ("[S]ince the "Tate Letter" of 1952 . . . foreign sovereign immunity had not extended to the commercial activity of a foreign state."). *Accord Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1025 (D.C. Cir. 1982). We need not, however, reach the question whether the FSIA applies to claims that arose between 1952 and 1977, because the claims presently at issue arose well before 1952. Therefore, we are not concerned with cases that apply the FSIA to post-1952 claims, such as *Ohntrup* v. *Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985), or *National American Corp.* v. *Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978) (Goettel, J.), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

The only cases relevant to the present inquiry are *Slade* v. *United States of Mexico*, 617 F. Supp. 351 (D.D.C. 1985), *aff'd mem.*, 790 F.2d 183 (.D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 1360 (1987), and *Jackson* v. *People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1371 (1987), which rejected a contention that the FSIA is applicable retroactively to commercial transactions that took place in the early part of this century, and *Schmidt* v. *Polish People's Republic*, 579 F. Supp. 23 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (1984), *Von Dardel* v. *Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), and *Asociacion de Reclamantes* v. *United Mexican States*, 561 F. Supp. 1190 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985), the only three cases plaintiffs cite in which the operative events allegedly occurred before 1952.

This Court does not find *Schmidt*, *Von Dardel*, or *Reclamantes* to be persuasive authority. In *Schmidt*, the district court found that it had subject matter jurisdiction under the FSIA's commercial activity exceptions, noting that "FSIA gives the Court jurisdiction over any non-jury civil action against a foreign state as long as the defendant is not entitled to sovereign immunity." 579 F. Supp. at 26.[15] This is, to be sure, language congenial to plaintiffs. Judge Carter did not discuss the problem of FSIA retroactivity at all in *Schmidt*, however. He noted that actions against foreign sovereigns were possible before the FSIA, but does not say whether they were possible before the Tate Letter. Judge Carter noted two events, however, that could have tolled the statute of limitations, by constituting acknowledgment of Poland's debt, so as to keep the *Schmidt* plaintiffs' claim alive past 1952: listings of the Polish Treasury notes at issue as state debts in 1946, which would have extended the limitations period until 1952, and a letter by a Polish plenipotentiary to an assistant United States Secretary of State expressing Poland's intention to negotiate directly with American

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15 *Schmidt* was filed on January 16, 1984, almost a year after this Court entered the default against the Soviet Union, about six months after the Supreme Court decided *Verlinden*, and two years before we entered the default judgment in this case.

bondholders which, if it were an acknowledgement, would have extended the limitations period to 1966. 516 F. Supp. at 29. Thus, the district court decision in *Schmidt* is not really a clear example of application of the FSIA to operative events before 1952. More importantly, the Court of Appeals's affirmance was assuredly not such an example. The Court of Appeals affirmed on statute of limitations grounds, without reaching Poland's cross-appeal on jurisdictional grounds.[16]

Von Dardel was an action against the Soviet Union for the seizure and detention of the heroic Swedish diplomat Raoul Wallenberg, whose singlehanded efforts saved the lives of nearly 100,000 Hungarian Jews at the close of the Second World War. As is well known, Raoul Wallenberg was arrested by Soviet occupation forces in Budapest in early 1945 and has not been heard from since. The Soviet Union, in a note to the Swedish Embassy by then Deputy Foreign Minister Andrei A. Gromyko, represented in 1957 that Wallenberg had died of natural causes in 1947. Persistent reports from former Soviet prisoners, however, indicated that Wallenberg was alive and in Soviet custody long after 1947, and may indeed be alive today. The *Von Dardel* court could not, on the record before it, make a finding about whether Wallenberg is still alive, but was able to characterize the Soviet Union's treatment of him as an "ongoing tort," 623 F. Supp. at 260. Thus, if Wallenberg is still alive, the Soviet Union's tortious conduct continues to this day; and if he is dead, because the *Von Dardel* plaintiffs are even now not in a position to know this fact through the exercise of reasonable diligence, under applicable statutes of limitation their

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16 In its cross-appeal, Poland objected to personal jurisdiction, but because it did not dispute service, the ground of its objection could only have been lack of subject matter jurisdiction. In the district court Poland answered and asserted lack of subject matter jurisdiction, among other things, as an affirmative defense.

Schmidt illustrates the *Bell* v. *Hood* problem discussed *supra*. A dismissal of a claim as time barred is a dismissal for failure to state a cause of action, and thus is one on the merits. It could only have come after the court determined that it had subject matter jurisdiction. The present case differs from *Schmidt* in that this Court holds that there is no subject matter jurisdiction because none of the FSIA exceptions to sovereign immunity apply, for the reason that they could not apply before 1952.

claims have not yet accrued. Thus, whatever the circumstances, the *Von Dardel* plaintiffs have viable post-1952—indeed, post-1977—claims, so that *Von Dardel* does not involve retrospective application of the FSIA.

Finally, *Reclamantes* involved a class of land claimants allegedly deprived of their property at about the time the Republic of Texas was incorporated into the United States, in spite of the fact that the Treaty of Guadelupe Hidalgo, 9 Stat. 922, T.S. No. 207 (Feb. 2, 1848), which ended the Mexican-American War and effected that incorporation, specifically protected plaintiffs' claims. 561 F. Supp. at 1192; 735 F.2d at 1519. The Mexican Government, however, espoused those claims in the early 1920s; the ultimate result was the Treaty on Final Settlement of Certain Claims, 56 Stat. 1347, T.S. No. 980 (Nov. 19, 1941), under which Mexico assumed the obligation to compensate its own nationals for their land claim. Unfortunately, Mexico had done nothing to discharge this obligation in the forty years intervening before *Reclamantes* was filed. Nonetheless, Mexico had consistently acknowledged its obligation to pay plaintiffs' claims—as recently as January 29, 1982, after the suit was filed, *see* 561 F. Supp. 1195 (acknowledgement by Attorney General of Mexico); *id.* 1193 (filing of suit September 18, 1981)—so that even though the alleged deprivation of property occurred over 140 years ago, the plaintiffs in *Reclamantes* had a post-1952 claim, for compensation for that taking.

Thus, plaintiffs have not directed us to a case that genuinely involves pre-1952 retroactive application of the FSIA. By contrast, the present case, *Jackson*, and *Slade* involve no operative events after 1952. This Court finds *Jackson*, in particular, so similar to the instant case as to be dispositive. Indeed, at oral argument plaintiffs' counsel conceded that if *Jackson* was rightly decided it is dispositive against the present plaintiffs.

Like the present case, *Jackson* involved defaulted bonds issued long ago by a defunct Imperial Government—in *Jackson*, forty-year bonds issued in 1911 to help finance the building of the Huguang Railway. Soon afterward, the Imperial Chinese Government ceased to exist as a result of the Revolution of 1911; its successor, the Republic of China, made interest payments until the mid-1930s. The district court at first entered a

default when the Republic's successor, the People's Republic of China, failed to appear. As in the present case, representatives of the State Department then explained the United States' adoption of restrictive immunity and the FSIA, and persuaded the People's Republic to enter a special appearance. The district court then vacated the default to consider whether it had subject matter jurisdiction, and finding that it did not because the FSIA does not apply to pre-1952 transactions, dismissed the complaint. The Eleventh Circuit affirmed, using reasoning virtually identical to that offered here.

This Court cannot discern such difference between the present case and *Jackson* sufficient to allow us to distinguish *Jackson*. Persuaded by the reasoning of that case and by all the other considerations advanced herein, we hold that the default judgments previously entered in these cases are void for want of jurisdiction under Fed. R. Civ. P. 60(b)(4), and accordingly dismiss the Complaints without prejudice and without costs.

The Clerk shall enter new judgments.

So Ordered.

/s/ CHARLES L. BRIEANT
Charles L. Brieant
Chief Judge

Dated: White Plains, New York
July 31, 1987

APPENDIX G

Judgment August 4, 1987 on Memorandum Decision and Order, Brieant, Ch. J. (Bearer Bonds)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIVIL 1245-CLB

Filed Aug 4 1987

CARL MARKS & CO.
HUBERT PARK BECK
MOSES K.S. ALTMAN
as holder of 5 year bonds issued
by the Imperial Russian Government,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

JUDGMENT

Defendant(s) having moved for an order pursuant to Rule 60(b)(4) F.R. Civ. P., and the said motion having come before the Honorable Charles L. Brieant, Chief, United States District Judge, and the Court thereafter on August 3rd, 1987, having handed down its memorandum and order, granting the said motion, and holding that the default judgment previously entered in this case is void for want of jurisdiction, it is

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, without prejudice and without costs.

Aug. 4th, 1987
Dated: White Plains, N.Y.

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX H

Judgment August 4, 1987 on Memorandum Decision and Order, Brieant, Ch. J. (Credit Participations)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIVIL 1246-CLB

Filed Aug 4 1987

CARL MARKS & CO.
HUBERT PARK BECK
MOSES K.S. ALTMAN
as holders of participation certificates in the $50,000,000 credit to the Imperial Russian Government dated 6/19/1919,

Plaintiffs,

—against—

UNION OF SOVIET SOCIALIST REPUBLICS,

Defendant.

JUDGMENT

Defendant(s) having moved for an order pursuant to Rule 60(b)(4) F.R. Civ. P., and the said motion having come before the Honorable Charles L. Brieant, Chief, United States District Judge, and the Court thereafter on August 3rd, 1987, having handed down its memorandum and order, granting the said motion, and holding that the default judgment previously entered in this case is void for want of jurisdiction, it is

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, without prejudice and without costs.

Aug. 4th, 1987
Dated: White Plains, N.Y.

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX I

Litvinov Assignment, dated November 16, 1933, reprinted in Establishment of Diplomatic Relations With the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1, 1933 pp. 13-15, and at *United States* v. *Pink*, 315 U.S. 203, 211-13.

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case by any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,
Very sincerely yours,

MAXIM LITVINOFF
People's Commissar for Foreign Affairs,
Union of Soviet Socialists Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

APPENDIX J

Foreign Sovereign Immunities Act of 1976

28 U.S.C. § 1330, 1391(f), 1441(d), 1602-11

§ 1330

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [28 USCS §§ 1605-1607] or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title [28 USCS § 1608].

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title [28 USCS §§ 1605-1607].

§ 1391(f)

(f) A civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title [28 USCS § 1605(b)];

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality

of a foreign state as defined in section 1603(b) of this title [28 USCS § 1603(b)]; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

§ 1441(d)

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter [28 USCS § 1446(b) may be enlarged at any time for cause shown.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [28 USCS § 1332(c), (d)], nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607].

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the

maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 USCS § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state;

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a) (4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a for-

eign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 USCS §§ 1610, 1611].

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter [28 USCS § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1602], if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1062], if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a) (2), (3), or (5), or 1605 (b) of this chapter [28 USCS 1605(a) (2), (3), (5), (b)], regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [28 USCS § 1608(e)].

(d) The property of a foreign state, as defined in section 1603(a) of this chapter [28 USCS § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act [22 USCS §§ 288 et seq.] shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

APPENDIX K

Letter, July 21, 1972, Department of State to Edwin S. Marks

[SEAL] DEPARTMENT OF STATE

Washington, D.C. 20520

July 21, 1972

Mr. Edwin S. Marks
Carl Marks & Co. Inc.
77 Water Street
New York, New York 10005

Dear Mr. Marks:

Thank you for your letter of June 5, 1972 concerning your recent meeting with officers of the Department regarding unsettled bond claims of nationals of the U.S. against the Soviet Government. You refer to my statement during the meeting about the legal distinction between repudiated and defaulted bonds under principles of international law and request further information about the matter.

In 1916 the Imperial Russian Government floated two different types of dollar bonds. One issue, dated 1916 and due in 1919 provided for an interest rate of 6-1/2 percent, while the other issue, dated 1916 and due in 1921 provided for an interest rate of 5-1/2 percent. The face value of such bonds was $75,000,000 - $50,000,000 for the bonds due in 1919 and $25,000,000 for the bonds due in 1921. These bonds were floated in the United States in 1916 by a bankers' syndicate headed by J.P. Morgan and Company and the National City Bank of New York.

On March 16, 1917, the Imperial Russian Government was overthrown and succeeded by a "Provisional Government" which was the immediate predecessor of the Soviet Government. On January 21, 1918, the Soviet Government issued a decree "published in No. 20 of the Gazette of The Workers' and Peasants' Government, dated January 28, 1918" with regard to "The Annulment of State Loans." That decree states:

"1. All State Loans concluded by the governments of the Russian landowners and the Russian bourgeoisie enumerated in a specially published list are annulled (abolished) beginning with December 1917. The December coupons of said loans are not subject to payment.

"2. All foreign loans are annulled unconditionally and without exception."

As you know, on August 9, 1955 the President signed Public Law 285, 84th Cong., Chapter 645—1st session, further amending the International Claims Settlement Act of 1949. Section 305(a) of the Act gave the Foreign Claims Settlement Commission jurisdiction "to receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of . . . claims arising prior to November 16, 1933 of nationals of the United States against the Soviet Government. . ."

In the circumstances the question presented to the Commission was whether claims for the Dollar Bonds issued by the Imperial Russian Government and repudiated by the Soviet Government, were compensable under Section 305(a) of the Act. and international law. The Commission answered such question in the affirmative and made awards to owners of repudiated dollar bonds.

In arriving at the above mentioned conclusion the Commission relied heavily on the position of the Department of State, textbooks on international law, the decisions of international tribunals and to a lesser extent on the legislative history of the law.

The foregoing authorities agree that a contracting State may, in the exercise of the same sovereign power which it exerted in the issuance of its bonds, as by appropriate legislative action, endeavor to change its covenants or to repudiate them. Any such conduct on the part of a State which serves either to alter or destroy, i.e. repudiate, its covenants registered in a bond owned by an alien obligee, and simultaneously also to remove from the jurisdiction of any domestic tribunal authority to pass upon the propriety of that conduct, excuses immediate interposition by the State of the obligee, and justified the demand by the latter

that the matter be referred for adjustment by an international tribunal clothed with power to determine the legality, in an international sense, of the acts of the obligor. This is true regardless of lack of proof of bad faith on the part of the obligor in doing what it did.

Repudiation constitutes a refusal to admit the binding character of an obligation. The repudiation may extend to the debts as a whole, or only to some part of it or its contractual terms. Simple default, on the other hand, admits the binding character of the debt but pleads inability to meet its terms. Repudiations have often followed revolutions, when the new government repudiated obligations contracted by a previous *de jure* or *de facto* government, on the allegation that the prior government had no authority to bind the nation. The outstanding example, of course, is the repudiation by the Soviet Government of the Czarist debt of some $20 billion.

With respect to breaches of contract as distinguished from repudiation, between a foreign state and a national of the United States, the Department of State does not intervene in the absence of a showing of a denial of justice. This practice is based on the proposition that the Government of the United States is not a collection agency.

Well-recognized international legal authorities suggest that the original relation between a state and a foreign lender is not one of the international law inasmuch as the government of the lending creditor will not, as a general rule, on mere default of the debtor state, undertake to intervene in his behalf. While the situations created by defaults on foreign bonds, whether partial or complete, are given constant study by the Department of State, it has been the policy to consider them primarily matters for direct negotiation and settlement between the foreign debtors and the American bondholders or their representatives. The Department of State, of course, renders all appropriate informal assistance to facilitate a satisfactory settlement. In other words, international law distinguishes sharply between the legal consequences attaching to repudiation, the publicly declared refusal to pay, and mere default, usually an involuntary and not

publicly declared failure to pay. Only repudiation or willful breach is regarded as violative of international law.

In view of the foregoing, it is the opinion of the Department that the repudiation by the Soviet Government of the dollar bonds floated by the Imperial Russian Government without permitting judicial action against it gives rise to an international claim which could be espousable by the United States in accordance with established principles of international law.

I hope the foregoing will be of assistance to you. If I can be of additional assistance, please do not hesitate to let me know.

Sincerely yours,

/s/ FABIAN A. KWIATEK
Fabian A. Kwiatek
Assistant Legal Adviser